

MOSS v. BALLARD
CASE NO. 2:09cv01406

RESPONDENT'S EXHIBIT 30

IN THE CIRCUIT COURT OF KANAWHA COUNTY,

WEST VIRGINIA

STATE OF WEST VIRGINIA

vs.

Action No. 82-F-221

JOHN MOSS

BEFORE: Hon. A. Andrew MacQueen

3/19/90

SUPPRESSION HEARING

March 19, 1990

935

Connie L. Cooke

Official Reporter

APPEARANCES

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1 BE IT REMEMBERED, that on Monday, the 19th day of
2 March, 1990, during the January 1990 Term of said Court, in
3 the matter of the State of West Virginia versus John Moss,
4 Defendant, upon Action No. 82-F-221, during a Suppression
5 Hearing, the following transpired:

6
7 THE COURT: I'll admit, unfortunately, that I
8 intended to read the Supreme Court's opinion in this case
9 before I began this hearing, and didn't do it. I need to
10 know what's at issue. Have you got a copy?

11 MR. BICKLEY: Yes, I do have, your Honor. I also
12 have for the Court, which the State has, this is the Code
13 that we'll be arguing from, and this is the case that the
14 Supreme Court made reference to, and here's another case
15 that has some relevance in re. John Moss, Elsworth.

16 THE COURT: Okay.

17 MR. BICKLEY: The -- your Honor, we're on our --
18 we are the moving party, and I sort of had -- I guess it --
19 it is propitious for me to begin -- well to begin, we are
20 here on the fact that we want to suppress two of the
21 confessions made by John Moss, for lack of presentment.
22 If I like -- I'd like to do a chronology of the events by
23 John Moss, and I think it will put everything in
24 perspective and the basis for our argument. I'll use the

1 chalkboard.

2 In January 1980, your Honor, two State
3 Policemen, Scott and Wilson -- I believe it's Scott and
4 Wilson.

5 MR. HUFFMAN: Williams and Smith.

6 MR. BICKLEY: Huh?

7 MR. HUFFMAN: Williams and Smith.

8 MR. BICKLEY: Williams and Smith went to
9 Mansfield, Ohio, to take -- to get blood.

10 MR. HUFFMAN: Cleveland.

11 MS. LUSK: They went to Cleveland.

12 MR. BICKLEY: Huh?

13 MR. HUFFMAN: They went to Cleveland.

14 MS. LUSK: To Cleveland.

15 MR. BICKLEY: To Cleveland?

16 MR. HUFFMAN: I'm sure you're thinking about a
17 different case.

18 MR. BICKLEY: No, it's the same case. I thought
19 they went to Mansfield.

20 MS. LUSK: That was in April.

21 MR. HUFFMAN: That was in April.

22 MR. BICKLEY: No, no. In April they got the
23 legal blood sample.

24 MR. HUFFMAN: All right.

1 MR. BICKLEY: In January 1980, they got illegal
2 blood samples. That's what I'm talking about. Okay?

3 MS. LUSK: In Cleveland.

4 MR. HUFFMAN: Cleveland.

5 MR. BICKLEY: Where was it, John?

6 MR. MOSS: Cleveland.

7 MR. BICKLEY: Okay. They went to Cleveland, and
8 they got illegal blood sample. That is, they did not talk
9 to an attorney, and they was reported. The attorney
10 suppressed that and made them to send the blood sample back
11 to Cleveland.

12 Then in April, they got a Court Order,
13 the same two Troopers. And --

14 THE COURT: If I recall, just from incidental
15 knowledge, Mr. Moss was in custody in Cleveland at this
16 time on an unrelated charge.

17 MR. BICKLEY: Right, unrelated charge.

18 THE COURT: How old was he then?

19 MR. BICKLEY: He was sixteen or seventeen --

20 MR. HUFFMAN: Seventeen.

21 MR. BICKLEY: -- at the time. Now, in 1980 -- I
22 mean April of '80, they got -- legally they got the blood.
23 They got a Court Order and went up and got the blood.

24 Then in September of '80, they got a

1 detrainer on malicious wounding. Then in October, the 28th
2 specifically -- and this is the two confessions we wish to
3 suppress. In October of '80, they went to exercise this
4 detrainer; that is, they went up and got John Moss. This is
5 in Mansfield, Ohio. Mansfield, Ohio, isn't it?

6 MR. HUFFMAN: Mansfield.

7 MR. BICKLEY: And from this trip, coming back,
8 the two officers had some conversation, some smattering of
9 conversation, about malicious wounding. But obviously,
10 their intent was not about the malicious wounding, but
11 about the murder trial, the murder.

12 THE COURT: Excuse me. What was the charge of
13 malicious wounding? I mean, who was the victim of the
14 malicious wounding?

15 MR. BICKLEY: It was some -- they were
16 investigating a shooting down at the Moose Lodge or some
17 such thing here in Charleston.

18 THE COURT: Unrelated to the Reggetz case?

19 MR. BICKLEY: Unrelated to the Reggetz case
20 altogether. That's what the detrainer was on.

21 In Parkersburg they secured an oral
22 confession and an electronic confession. This is October
23 the 28th. They went from Parkersburg, stopped in
24 Parkersburg, delayed in Parkersburg, gave him food and

1 what-have-you and secured an oral and electronic
2 confession.

3 They brought him here to the Kanawha
4 County Jail on the 29th, made no presentment to a
5 Magistrate or a Judge or anything, did not do the same --
6 did not do the same here in Parkersburg. He stayed
7 overnight in the Kanawha County Jail.

8 On the 30th of October, on route back
9 to Mansfield, they obtained another oral confession.

10 THE COURT: Now, in that interim between the 29th
11 and 30th, was he arraigned?

12 MR. BICKLEY: No; nothing happened. It is the
13 30th confession with which -- it was the 30th confession,
14 the 30th of October, that the Supreme Court suppressed. It
15 was -- the Supreme Court stated they were required to make
16 a presentment and they did -- failed to do so, but they did
17 not reach the other two confessions, because there was no
18 presentment objection made in the course of the trial.

19 And we maintain that, one, it was a
20 subterfuge of the detainer, the malicious wounding
21 detainer, that they went after, to get him to come back to
22 Charleston. Enroute from Parkersburg, to Parkersburg and
23 in Parkersburg --

24 THE COURT: Did they stop in Parkersburg on the

1 way back from Ohio?

2 MR. BICKLEY: They stopped in Parkersburg. They
3 took the oral confession and then they taped it.

4 THE COURT: Where did they stop?

5 MR. BICKLEY: At the detachment.

6 MR. REVERCOMB: State Police detachment.

7 MR. BICKLEY: State Police Detachment.

8 THE COURT: Was that a brief stop and then they
9 came on the same day to Charleston?

10 MR. BICKLEY: Well, it wasn't brief. It was over
11 several hours.

12 THE COURT: But, I mean, they didn't spend the
13 night there?

14 MR. BICKLEY: They did not spend the night there.
15 In fact, these two State Policemen, these are the same
16 fellows who went up and got the blood from him illegally
17 and later legally.

18 Now, these two officers knew that he
19 had counsel. Or at least they knew that he had counsel in
20 Mansfield, because they had already ran into him when they
21 took his blood up there in Cleveland. They failed to make
22 a present-- --

23 THE COURT: Counsel on the Cleveland charge?

24 MR. BICKLEY: On the mali-- -- on the Cleveland

1 charge. But that -- that was the same -- they had counsel
2 on the Cleveland charge when they took his blood illegally
3 also.

4 THE COURT: Now, there's a West Virginia case of
5 that fellow up in Morgantown.

6 MS. LUSK: Elsworth.

7 THE COURT: Yeah, and if I recall correctly, it
8 was a related set of circumstances. He had an abduction in
9 New Jersey.

10 MR. REVERCOMB: Yes, your Honor.

11 THE COURT: And he had counsel on that, and they
12 got a statement from our Supreme Court, as I recall, that
13 said that the fact that he had the counsel on an unrelated
14 charge didn't mean that that had anything to do with it,
15 that he had exercised his right to counsel in a different
16 charge than the West Virginia charge.

17 MR. BICKLEY: Now the Supreme Court never
18 mentioned in remanding the case of --

19 THE COURT: But I'm talking about in an
20 independent case.

21 MR. BICKLEY: Oh.

22 THE COURT: Is that my recollection?

23 MR. REVERCOMB: That's right.

24 MS. LUSK: Your Honor, do you want me to add

1 facts as we go through here?

2 THE COURT: Wait. Let me hear Mr. Bickley.

3 MR. BICKLEY: The Supreme Court never mentioned
4 the lack of counsel in reference to when they -- when they
5 suppressed it.

6 THE COURT: October 29th.

7 MR. BICKLEY: The -- October 30th. Nothing
8 happened on October 29th. Nothing, as far as -- the --
9 October 28th is the two confessions that we wish to
10 suppress based upon --

11 THE COURT: Based upon what the Supreme Court
12 said?

13 MR. BICKLEY: Was suppressed. Our argument that
14 no presentment was made, that there was deliberate
15 delaying, they were using a subterfuge and malicious
16 wounding to get him here -- or to get him in route, they
17 secured a confession delayed in waiting in Parkersburg, had
18 opportunity to present him to a Magistrate or a Judge.

19 THE COURT: Where?

20 MR. BICKLEY: In Parkersburg.

21 THE COURT: How can he answer Kanawha County
22 charges before a Magistrate there?

23 MR. BICKLEY: I don't know whether the
24 requirement is to answer to the county, but they had to --

1 someone had to tell him what his rights were, that he could
2 have counsel.

3 THE COURT: I don't understand anybody has any
4 jurisdiction on the Reggetz charge except a Judge or
5 Justice or Magistrate in Kanawha County.

6 MR. BICKLEY: Well, even if -- that was never
7 satisfied, even in Kanawha County.

8 THE COURT: I understand. I understand that's
9 your position.

10 MR. BICKLEY: Now, here it says "A child in
11 custody must immediately be taken before a Referee or Judge
12 of the Circuit Court, and in no event shall a delay exceed
13 the next succeeding judicial day."

14 Now, in this instance here, he had
15 never been taken before a Magistrate or a Judge in the time
16 frame that we're making reference to; he was never taken.
17 And we feel that all of the circumstances which the 30th of
18 October's suppression, all of them, are the same as here,
19 the oral and electronic confession.

20 THE COURT: Well, certainly one of them isn't.
21 And by October he's not been presented before a Magistrate.
22 In the first place, he's in Kanawha County --

23 MR. BICKLEY: Yes, sir.

24 THE COURT: -- on the 30th or before the 30th.

1 That's number one. And number two, the 30th is longer than
2 the next judicial day from the time he's taken into custody
3 initially on the 28th. So you've got two distinctions, it
4 appears to me, anyway.

5 MR. BICKLEY: Well, that's correct. That's even
6 better than the 30th. That is, on the -- he gave a
7 confession on the 28th. He was overnight here in jail on
8 the 29th. He went back on the 30th. They took it -- they
9 suppressed the confession on the way back from there. We
10 don't next have a succeeding day, which we do on this one.

11 THE COURT: No. I'm saying the 30th is beyond
12 the next succeeding day. It doesn't comply with that
13 requirement of the statute that he must be presented within
14 the next succeeding day, on the 30th. But that doesn't
15 apply to the 28th confession. That's within -- that is not
16 without the next succeeding day requirement.

17 MR. BICKLEY: I don't understand. It says -- the
18 quote said, "in no case beyond the next succeeding day,"
19 and the next succeeding day is the 29th.

20 THE COURT; Right, so they got him within the
21 next succeeding day. They didn't violate that Rule.

22 MR. BICKLEY: No, no. He has to go before a
23 Judge or a Magistrate by the next succeeding day.

24 THE COURT; I understand that.

1 MR. BICKLEY: But he did not.

2 THE COURT: Right. I understand that. If they
3 had taken a statement from him -- they'd take him into
4 custody on the 28th and within ten minutes they got a
5 statement from him, and twenty minutes later, they take him
6 before a Magistrate, that's okay. Right?

7 MR. BICKLEY: Twenty minutes later?

8 THE COURT: Yes.

9 MR. BICKLEY: Yes.

10 THE COURT: Now, in this case, they're in route.
11 They've got no ability to take him before a Kanawha County
12 Magistrate, because they're not in Kanawha County, and they
13 have not gone beyond the next succeeding day, on the 28th,
14 have they?

15 MR. BICKLEY: No. On the 28th.

16 THE COURT: That's the distinction that I think
17 might be critical here.

18 MR. BICKLEY: They went by the next -- the 29th,
19 which is the next succeeding day.

20 THE COURT: Right. I understand that.

21 MR. BICKLEY: And they failed to take him to a
22 Magistrate or a Judge.

23 THE COURT: Wait a second. Let me look at
24 something here.

1 MR. BICKLEY: It's our argument, your Honor, that
2 they should not have talked to him at all. They should
3 have brought him on to Kanawha County, made a presentment
4 before the Magistrate or a Judge, then made their query.

5 THE COURT: Well, is there some -- certainly the
6 statute doesn't require that. Is there some holding that
7 they can't talk to a defendant before he's presented to a
8 Magistrate, some Court case to that effect?

9 MR. HUFFMAN: Judge, if I may, I think the copy
10 that he gave you, the court's ruling in the Elsworth case,
11 says that -- it's cited directly in the opinion --

12 THE COURT: Right.

13 MR. HUFFMAN: -- where it says, in Elsworth when
14 it talks about no proper presentment was made at trial,
15 basically. The Court's basic holding in Elsworth was that
16 there should not be a delay in a juvenile -- in fact, it
17 says here that I'm looking at in Elsworth on page 508, note
18 number 6, "Consequently, we conclude that under West
19 Virginia Code 49.58(d), when a juvenile is taken into
20 custody, he must immediately be taken before a Circuit
21 Judge or a Magistrate. If there is a failure to do so, any
22 conviction obtained as a result of the delay will be
23 invalid, where it appears the primary purpose of the delay
24 was to obtain a confession from the juvenile."

1 THE COURT: Right.

2 MR. HUFFMAN: And that's what we contend.

3 THE COURT: Okay.

4 MR. HUFFMAN: They made the trip down to
5 Parkersburg, the stopped specifically --

6 THE COURT: But this doesn't say that no
7 statement taken prior to a presentment to a Magistrate is
8 invalid.

9 MR. HUFFMAN: No, no. I think there's a
10 distinction between if they picked him up, he's in the car
11 and they're on their way to do it. This was not the case
12 here. They specifically stopped. And I think if you'll
13 look at it, there is a confession already, from the
14 troopers' notes that was given to us as part of the State's
15 Answer to our Motion to Produce. Specifically, they
16 discuss putting him in the car and the first thing they
17 talked about was the malicious wounding charge. And at
18 that point, when they stopped talking to him about that,
19 the troopers determined they wouldn't discuss anything
20 further in the car, that they would go to Parkersburg and
21 stop, and at that point is where the discussions became
22 discussions surrounding the events in this particular case.

23 THE COURT: I understand that, but why was there
24 a stop in Parkersburg?

1 MS. LUSK: Your Honor, the stop at Parkersburg
2 was so that the confession could be taken in a place that
3 was more comfortable. They could get a place to eat, they
4 could go to the rest room.

5 THE COURT: Had he made no oral statement at that
6 point?

7 MR. REVERCOMB: No, your Honor.

8 MS. LUSK: No. He had agreed to talk with them,
9 and Trooper Smith had told him that he thought it was more
10 appropriate that they sit down and talk, get something to
11 eat, go to the rest room, and not discuss such a serious
12 matter in the back seat of a State Police cruiser.

13 And I believe, as I recall the Moss
14 decision, there's a footnote in it that implies that the
15 Court thought that that was good, that they didn't spend
16 their time taking this statement in the back seat of the
17 police cruiser.

18 THE COURT: Where is it?

19 MS. LUSK: Footnote 15. It says the troopers
20 delayed questioning until the group arrived at the State
21 Police Detachment at Parkersburg. I got the impression
22 there that they thought that was good.

23 MR. REVERCOMB: Your Honor, they do --

24 THE COURT: Let me --

1 MR. REVERCOMB: Pardon me.

2 THE COURT: -- read that for just a second.

3 Okay.

4 MS. LUSK: They also distinguish that fact, I
5 believe, from the State versus Mollohan facts, which was
6 another extradition case in which a statement was taken in
7 a police cruiser. That's where it says the confession was
8 taken entirely, solely within the confines of the patrol
9 car during a two-day journey from New Hampshire to West
10 Virginia.

11 You know, I got the impression between
12 those two things that they thought it was a better idea to
13 stop, go to the rest room and so forth.

14 MR. BICKLEY: Your Honor, but we think that that
15 was strictly on the voluntariness of the confession. We
16 concede, and the Court concluded, that it was voluntary.
17 It was the prompt presentment which the 30th was ruled out,
18 and we think that the 28th should have been also.

19 THE COURT: I understand that.

20 MS. LUSK: Your Honor, if I could fill in --

21 THE COURT: I think you're correct in that. I,
22 frankly, don't think the Supreme Court was hard pressed to
23 find some law specifically on a car. They're not going to
24 be able to -- the Supreme Court couldn't find something

1 inherently bad about obtaining a confession in a car versus
2 the police station. I'm sorry; go ahead.

3 MS. LUSK: If I could fill in a few more facts,
4 Judge, the defendant had been in Ohio during the January
5 and April dates that Mr. Bickley has indicated there. He
6 was in juvenile custody in Cleveland and had been charged
7 up there as a juvenile with rape, attempted robbery,
8 dangerous and deadly weapon, there was an attempted murder
9 and a sexual assault charge, all arising from the same
10 transaction.

11 The troopers testified that when they
12 went to Cleveland in January of 1980, they did not know
13 that John Moss had a lawyer in Ohio, and my recollection is
14 that the person who came and brought to the Court's
15 attention that they had taken the blood sample from Mr.
16 Moss was somebody who worked there in the detention center.
17 And I believe Trooper Smith testified -- I'm not sure this
18 is of any great import -- but he testified that he was not
19 aware that there was a lawyer there.

20 In April, after the Court Order was
21 obtained in Cleveland for the seizure, the blood was seized
22 by West Virginia authorities as well as Cleveland
23 authorities. Both authorities were there at the same time
24 for the drawing of that blood. Cleveland got some of the

1 blood and we got some of the blood.

2 By September -- in May I believe it was
3 -- Mr. Moss was transferred --

4 THE COURT: What's the purpose of seeking the
5 blood in April?

6 MS. LUSK: The West Virginia authorities?

7 THE COURT: Uh-huh.

8 MS. LUSK: For the Reggetz homicide.

9 THE COURT: So at least by that point, they had
10 focused their investigation on Mr. Moss?

11 MS. LUSK: Absolutely, your Honor. As a matter
12 of fact, I believe in April was when the indictment was
13 returned, and Mr. Moss is named but not indicted in the
14 Reggetz indictment in April.

15 THE COURT: You mean Mr. Reggetz was indicted in
16 April?

17 MS. LUSK: Right, and Mr. Moss was named but not
18 indicted in that indictment. There's no question that
19 there was a focus on him at that time.

20 By May, Moss was transferred over to
21 adult jurisdiction in Ohio on those charges that he was in
22 a juvenile facility for, and he was convicted as an adult
23 over there of rape and attempted murder. He was sentenced
24 in Ohio to serve a term of four to twenty-five years.

[]

1 In October, after the detainer was
2 filed on the malicious wounding, we would take issue with
3 Mr. Bickley's contention that we just made this all up.
4 And I'm pointing out to the Court that there has been
5 scientific testing done in the malicious wounding charge.
6 They had gone up to Cleveland and gotten the weapon which
7 was used in the Cleveland attempted murder and test fired
8 it against the bullets in the May '79 Moose Club malicious
9 wounding, and they had matched the weapon up.

10 So they had done scientific testing and
11 were in the process of an actual investigation for that May
12 1979 unrelated charge, the one the detainer was filed on.

13 They went up and got him on October the
14 28th, got him at a custody hearing --

15 THE COURT: Let me interrupt just a second. I'm
16 not sure I know the interstate or the multi-state statutes
17 on this detainer system. Was he required to waive
18 extradition in order to --

19 MS. LUSK: Your Honor, the law was not clear at
20 that time. It's not the extradition statute that we're
21 dealing with, which was found in Chapter 5. This is the
22 interstate compact on detainers, which is at 62-14 I think,
23 14.1.

24 THE COURT: Yes.

1 MS. LUSK: And it is clear now that he would have
2 been taken before a Judge and confronted with the charges
3 and asked to waive or not. At that time, that was not
4 clear and it's addressed in the Moss opinion that once we
5 got him here, even though they did that improperly in
6 Mansfield, he doesn't have any attack on that, because like
7 the extradition statute --

8 THE COURT: I understand that, but my question
9 is: Is that a point at which he would have had the
10 opportunity to have counsel appointed on this charge?

11 MS. LUSK: On the malicious wounding charge?

12 THE COURT: Or the Reggetz -- the killings.

13 MS. LUSK: Well, he wasn't charged at that point,
14 your Honor.

15 THE COURT: I understand that. I understand
16 that. Is that not a malicious wounding charge?

17 MS. LUSK: Not a West Virginia lawyer, I don't
18 believe, Judge.

19 THE COURT: Of coarse not. A Judge in Mansfield
20 -- no, I'm just -- under ordinary circumstances, then or
21 now, either one, would he have been routinely afforded the
22 opportunity for counsel to resist his removal to the State
23 of West Virginia?

24 MS. LUSK: I think he would be now, yes, sir.

1 THE COURT: But not at that time?

2 MS. LUSK: But not at that time, right.

3 THE COURT: And the Supreme Court says however
4 illegal it was, it's like the old cases where you snatch
5 somebody and bring them back?

6 MS. LUSK: Right.

7 THE COURT: All right.

8 MS. LUSK: And they address that specific point
9 in this Moss opinion. Once we got him, it was too late for
10 him to argue about what Cleveland should have done on the
11 extradition or the detainer procedures.

12 Okay, Moss was placed in the car on
13 October the 28th. Within a half an hour or so, Trooper
14 Smith advised him of his rights from the back of his ID
15 card. Smith had gotten into the back seat with him,
16 advised him of his rights.

17 THE COURT: Did he tell him why he was doing
18 that?

19 MS. LUSK: He told him he wanted to discuss some
20 crimes in West Virginia. He did not specifically mention
21 the Reggetz murders, and Smith has testified, and so has
22 Williams, that the Reggetz murders, the Reggetz name, was
23 not mentioned in the cruiser at all.

24 But Smith told him they had some

1 important crimes they wanted to talk to him about, after
2 advising him of his rights. Moss acknowledged his rights,
3 and this was oral, there was no waiver in the car, no
4 written form. Trooper Smith asked him --

5 THE COURT: About where did this occur?

6 MS. LUSK: About twenty minutes to thirty minutes
7 outside of Mansfield. This is about a four-hour drive or
8 -- about a four-hour drive.

9 THE COURT: From Mansfield to Parkersburg?

10 MS. LUSK: To Charleston. I don't believe --
11 it's about three hours to Parkersburg. I'm not sure
12 exactly on that, but it's hours rather than minutes.

13 Smith advised him of his rights orally
14 from the back of his ID card, his State Police ID card.
15 Moss acknowledged those rights, didn't have any questions,
16 never asked for a lawyer.

17 Smith asked him about the malicious
18 wounding charge, that incident at the Moose Club in May of
19 1979. Smith testified within five or ten minutes, he
20 confessed to that unrelated charge.

21 Smith then told him there was a much
22 more serious crime that he wanted to talk with him about.
23 He didn't think that they should talk about it in the car,
24 though, that it was too serious, that they should stop

1 somewhere where they could sit down and talk about it, get
2 something to eat.

3 Moss at first said he didn't know what
4 he was talking about, and Smith said, "Why do you think we
5 got your blood?" Moss then acknowledged that he knew what
6 they were talking about and also expressed a willingness to
7 talk to the police about the incident. There was no
8 further discussion in the car. Smith got back in the front
9 seat.

10 THE COURT: Just out of curiosity, this is all
11 represented, I take it, in suppression hearings that have
12 been held before Judge Hay.

13 MS. LUSK: Right.

14 THE COURT: Did anybody explain why it was too
15 serious to be talked about in the car?

16 MS. LUSK: I think he just made that statement,
17 Judge. I don't recall him saying why he thought so.

18 MR. REVERCOMB: Your Honor, I think Mollohan may
19 have had something to do with that. The State Troopers in
20 that case the Supreme Court had reversed because the
21 confession had been taken in the back of the cruiser, and
22 he just felt that it shouldn't be done like that.

23 THE COURT: Did he say that? Did the officer say
24 that?

1 MR. REVERCOMB: No, no, the officer didn't say
2 that, but I just was going by some other new cases, a more
3 recent case, again recites disapproval of the fact that on
4 the way back from an extradition, the officers didn't
5 sufficiently interrogate the prisoner in the back of a
6 cruiser. It's an '88 or '89 case. They had a belief and
7 at least in the cases I've looked at, the Court doesn't
8 approve of that practice for some reason.

9 MS. LUSK: They stopped enroute on at least one
10 other occasion and all three of the men went to the rest
11 room I believe at a service station.

12 They stopped then at the State Police
13 Detachment in Parkersburg, went in, told the officer in
14 charge that they would like to have a room to talk to Mr.
15 Moss. They were accommodated immediately. They all three
16 went to the rest room again. They ordered up some food.
17 One of the dispatchers there went out and got some food for
18 them.

19 Trooper Williams advised Moss of his
20 right again, this time from the form 79 that the State
21 Police routinely use. Moss waived those rights in writing
22 and then the troopers talked with him orally about the
23 Reggetz murders. Very little time lapsed between the
24 beginning of that conversation and the first inculpatory

1 statement by him. It was just a matter of minutes.

2 THE COURT: On Reggetz?

3 MS. LUSK: On the Reggetz murders, yes, sir. The
4 oral statement lasted approximately two hours. He was
5 advised of his rights at 6:50 p.m. and the waiver was
6 signed at 6:57.

7 Then sometime after 9:00, they looked
8 for a tape recorder and had a great deal of difficulty
9 finding a blank tape. As a matter of fact, they never did
10 find a blank tape there at the detachment. They had to
11 reuse one that had part of a dispatch on it.

12 Again at 9:28 he was read his rights,
13 this time by a Sergeant Crescent, who was the officer in
14 charge there of the detachment at Parkersburg. He waived
15 those rights and then confessed on tape to the Reggetz
16 murders.

17 During these confessions, he told the
18 police that he had taken a camera and a rifle out of the
19 Reggetz home at the time of the murders. These were facts
20 that the State Police didn't know about and Williams and
21 Smith left the detachment there at Parkersburg and went
22 back to Cleveland to search for those items.

23 Sergeant Preston made arrangements to
24 have Moss relayed back down to Charleston to be housed

1 here.

2 Then on the 30th, the Prosecutor's
3 Office I believe had made the decision not to pursue the
4 malicious wounding charge. He was relayed back up to
5 Mansfield, Ohio, where a new detainer was filed on the
6 murder charges.

7 THE COURT: Now, with a -- under the Interstate
8 Compact, would the State of West Virginia not have been
9 allowed to detain him on an independent charge?

10 MS. LUSK: No, sir.

11 THE COURT: So he had to actually legally be
12 trucked back there in order to get a --

13 MS. LUSK: Yes, sir, the way the detainer statute
14 is worded, we are only permitted to prosecute him while we
15 have him on the specific charges that are set forth in the
16 detainer papers.

17 THE COURT: Now, is there any dispute that Mr.
18 Moss had been informed of the nature of the detainer, the
19 malicious wounding detainer, at the time it was filed with
20 the appropriate authorities in the State of Ohio?

21 MS. LUSK: I think it's very unclear. In all
22 likelihood, he had not been. He says he wasn't and we
23 don't have any facts to refute that.

24 THE COURT: But he didn't know why there was a

1 detainer?

2 MS. LUSK: Well, he says he didn't know there was
3 a detainer, period. He testified in suppression that they
4 called him and told him he was going out to Court, to pack
5 his bag, and that he thought his sentence was going to be
6 reconsidered on his Ohio felonies.

7 THE COURT: Is there not some standard formal
8 procedure for not only notifying the responding State, but
9 the accused in that responding State?

10 MS. LUSK: Judge, there definitely is now. But
11 there is a United States Supreme Court case that came down
12 I believe in '80 or -- I mean I believe in '81 or '82 --
13 which said that the detainees and people who are being
14 transported under the Interstate Compact On Detainer are
15 entitled to the same rights as those transported under the
16 Extradition Agreement and that they have to be taken into
17 Court and have a chance to contest it. But that wasn't
18 decided in 1980.

19 THE COURT: Okay. Now, when is the first time
20 that Mr. Moss is made aware of the fact that he is the
21 subject of detention on the Reggetz case? When they asked,
22 "Why do you think we got your blood sample?"

23 MS. LUSK: January.

24 MR. REVERCOMB: Your Honor, this is important.

1 This is -- that in the back seat of the police car in
2 October of 1980. In January of 1980, both in Trooper
3 Smith's testimony in suppression, as well as the
4 defendant's testimony, Mr. Moss admits that they asked him
5 about the Reggetz murders and used the word "Reggetz" in
6 January of 1980, at the time they took the initial blood in
7 Cleveland.

8 THE COURT: And is that in the context that he
9 was a suspect?

10 MR. REVERCOMB: Well, Your Honor, they asked him
11 if he knew anything about it that they wanted some
12 information about it and they wanted to talk to him about
13 it.

14 MS. LUSK: And then again in April of course,
15 they came and got the blood specifically for the Reggetz
16 case, and those Court papers have the Reggetz name
17 throughout.

18 THE COURT: Those are Court papers filed in the
19 State of Ohio?

20 MS. LUSK: Yes, sir.

21 MR. REVERCOMB: Yes, sir.

22 THE COURT: Now, is all of this information that
23 both sides have given me reflected in the transcripts of
24 the suppression hearing?

1 MS. LUSK: Well, it's more than just a
2 suppression hearing, your Honor. There are --

3 THE COURT: Do you propose to put on evidence
4 today?

5 MS. LUSK: No.

6 MR. BICKLEY: We're arguing the law, your Honor.

7 THE COURT: Okay, I need for you to tell me what
8 -- specifically, what part of prior transcripts I need to
9 read in order to get the details of this factual
10 background.

11 MS. LUSK: Probably the biggest part of it would
12 be the Moss suppression hearing. Now I draw a little bit
13 -- because I've read it all, I draw a little bit from his
14 transfer hearings and the trial transcript itself. But the
15 biggest part of the facts will be contained in the Moss
16 suppression hearing in the testimony of Smith, Williams,
17 and Moss himself.

18 MR. REVERCOMB: And, your Honor, there are some
19 stipulations made in that suppression hearing referring
20 back to a transfer hearing.

21 THE COURT: Oh, is that right? Parts of that
22 testimony of the transfer hearing would be considered for
23 purposes of the suppression hearing?

24 MR. REVERCOMB: As to some of the facts of the

1 suppression hearing.

2 THE COURT: Okay. So I need the testimony of
3 who? Williams?

4 MR. REVERCOMB: Smith.

5 THE COURT: Smith?

6 MS. LUSK: And Moss --

7 THE COURT: And Moss.

8 MS. LUSK: -- testified at the suppression
9 hearing. He didn't testify at trial, but he did testify at
10 the suppression hearing.

11 MR. BICKLEY: Your Honor --

12 THE COURT: Yes, sir?

13 MR. BICKLEY: -- we're making a contention not
14 necessarily about the voluntariness of the confession, but
15 in using the case State v. Elsworth, the copy you have on
16 your desk and also marked on page 507, and I quote --

17 THE COURT: Hold on. Let me catch up with you.
18 507 in Elsworth?

19 MR. BICKLEY: Yes, sir. In the paragraph just
20 above that where you have colored, "We do so."

21 THE COURT: Yes.

22 MR. BICKLEY: "Because we do not believe that
23 this language is intended to sanction any delay in taking
24 a juvenile directly to a judicial officer, but rather, this

1 clause relates to how long a detention hearing may be
2 lawfully delayed when a child is being held in custody,
3 there is a temporal difference between advising the
4 juvenile to his rights and arranging to have a formal
5 detention hearing with the juvenile's counsel being
6 present. It is obvious that advising the juvenile to his
7 constitutional rights can be done immediately on the
8 appearance of the child, whereas a detention hearing
9 requiring the presence of a counsel may take some
10 additional time."

11 It is our argument, first off, that
12 this detention, the detainer for the malicious wounding was
13 a subterfuge to deal with the Reggetz. They went there
14 specifically for the Reggetz case.

15 THE COURT: Okay, now, let me ask this. How do
16 I -- do I just infer that from the totality of the
17 circumstances, or is there some direct evidence that this
18 is surreptitious here?

19 MR. BICKLEY: There is -- well, the direct
20 evidence would be the statement that Ms. Lusk was making in
21 reference to of the State Police themselves and how they
22 came to the confession.

23 They made a -- in this statement, which
24 we received on discovery, is the chronology of how the

1 State Police came to the confession. In fact, much of it
2 Neva recited for your purpose, and the first five minutes
3 they discuss something about malicious wounding.

4 For three days later, that is, from the
5 29th -- from the 28th, the 29th, and 30th, everything was
6 dealt with that had to do with the Reggetz murder.

7 Now, the Court says that delay in
8 taking the individual from the point of arrest to the Judge
9 is not counted as delay time to the Court. The
10 transportation is not counted as delay time. The Court
11 will give her that. But you see, there's an end to it when
12 he gets to the Magistrate. It sort of gives up the delay
13 time or non-delay time.

14 This man never got to a Magistrate or
15 a Judge, at no time. He was delayed intentionally in
16 Parkersburg in order to take this confession. But at no
17 time was he taken before a Magistrate or a Judge to be
18 advised, "Are you aware of your constitutional rights," et
19 cetera, et cetera, et cetera. In fact, he was transported
20 back on the 30th of October and if you look at the Court's
21 ruling, they had another day, the 31st, to take him by the
22 statute and the Supreme Court overruled the 30th of October
23 confession, even without the succeeding day.

24 We're arguing in our case that it's

1 even better, because on the 28th he gave the confession
2 oral and electronic, brought down here to Kanawha County,
3 kept in jail overnight, asked nothing about the malicious
4 wounding, went back on the 30th, never visited with a
5 lawyer, never visited with a Magistrate or a Judge, and we
6 believe that it fits on all four squares of the remand that
7 was based upon the 30th of October suppression.

8 THE COURT: Do you think that confessions without
9 counsel are inherently suspect under the constitutional
10 rule?

11 MR. BICKLEY: Not for an adult, your Honor. I
12 think that the Court's, the Legislature thinks, that any
13 confession by a juvenile is not as an adult ipso facto
14 voluntary.

15 THE COURT: That's only for adolescents under
16 sixteen, isn't it?

17 MR. BICKLEY: Yes, that is, yes. But in this
18 case, the Court took great -- in the brief and in the
19 remand and in the case that you have that opinion, they
20 indicated that he should have been taken -- it says here
21 again on page 508 of Elsworth, which the Court referred to
22 several times, "Consequently, we conclude that under West
23 Virginia Code 495(a)(d), when a juvenile is taken into
24 custody, he must immediately be taken before a Referee,

1 Circuit Judge, or Magistrate. If there is a failure to do
2 so, any confession obtained as a result of the delay will
3 be invalid for the primary purpose of the delay was to
4 obtain a confession from the juvenile."

5 Now, they could have cured this I
6 believe very simply on the 29th, had they marched him right
7 over to the Magistrate or a Judge and advised him that he
8 had certain rights and what-have-you, a constitutional
9 right to an attorney, and et cetera. But they failed to do
10 any of these things.

11 THE COURT: So you think if they had taken him
12 before somebody after the statement, it would have
13 validated the statement?

14 MR. BICKLEY: I think they have to question him
15 again then.

16 THE COURT: And get a new statement?

17 MR. BICKLEY: New statement.

18 THE COURT: See, if either of you disagree with
19 me, it doesn't matter with getting statements there, does
20 it? It's good police work to get a guilty party to confess
21 to a crime. Is that a fair statement?

22 MR. HUFFMAN: That's a fair statement.

23 THE COURT: None of us lawyers likes confessions.
24 Frankly, I asked the question about whether they are

1 suspect because I think generally everybody has some
2 reservations about it. But it is good police work to get
3 a confession from a guilty party.

4 MR. HUFFMAN: If you draw the distinction between
5 what's good police work and what's good to support a
6 conviction.

7 THE COURT: I understand that. I understand. No
8 good police officer wants a dirty confession.

9 Okay, now, do you think if they said --
10 they're coming down the road and they get over to about
11 Marietta and they smell a confession coming, and they say,
12 you know, "This is going to be easy if we could get this on
13 a tape recording," and they specifically figure, "We're
14 going to get us a rock solid confession, and the best way
15 to do it is to delay our trip to Charleston." Now is that
16 enough to invalidate the confession, that alone, if they
17 intended to stop to get a confession, a delay for that
18 purpose?

19 MR. HUFFMAN: I think it is under Elsworth.

20 THE COURT: But that's not what Elsworth says.
21 Elsworth is an affirmation of those facts. Everything that
22 Elsworth says is suggestive rather than dispositive.

23 MR. HUFFMAN: In this case, you've got the trip
24 down from Ohio where they left sometime in the afternoon --

1 3:00; I'm not sure -- they stopped in Parkersburg, an hour
2 from Charleston, an hour and ten minutes from Charleston,
3 at 7:00, before seven. The first statement is taken, he
4 signs a waiver at ten minutes till seven, they talk to him
5 and the second waiver he signs about 10:00 at night.

6 THE COURT: I've got some questions I want to ask
7 about that, but let's talk about the first confession. You
8 all don't derive a lot of benefit in terms of the defendant
9 in this case by getting a second confession suppressed, but
10 not the first, do you?

11 MR. HUFFMAN: I think they both got -- for the
12 same reason, I think they both need to be suppressed. And
13 I think for the same reason that the third confession was
14 suppressed, the first two should also be suppressed, and
15 the only reason the Court didn't do it whenever it was
16 there the last time, the objection was never preserved as
17 to these two prior to trial, because the Elsworth case took
18 place and was decided after this case was tried.

19 THE COURT: Now, let me add a little to the
20 formula. Does it make any difference if the police
21 officers believe that if they take Mr. Moss to a
22 Magistrate, they know that the Magistrate's going to, in
23 the ordinary course of affairs, as every Magistrate does in
24 every county in the State of West Virginia, want a form

1 provided to them by the West Virginia State Supreme Court
2 and he will be given his opportunity for counsel, and he
3 signs a financial affidavit and you know that the Supreme
4 Court says that that's an indication of his desire to have
5 counsel appointed, and from that point on, a law
6 enforcement officer can't talk with him anymore.

7 Let's assume that these officers think,
8 "If we wait till we get to Charleston, he's going to sign
9 that and then we're in a pickle. We're not going to get
10 this confession that's going to help our case." Does that
11 add anything to the case, do you think?

12 MR. HUFFMAN: I'm sure all the police officers
13 would think "If he's got a chance to talk to a lawyer,
14 we're not going to get a confession out of him."

15 THE COURT: That's not always the case.

16 MR. HUFFMAN: But what's balanced here is the
17 question of whether or not -- what's the statute intended
18 to do? I mean we're talking about a difference between an
19 adult and a juvenile. You know, what we're balancing is
20 whether or not police officers should be able to get a
21 confession before he sees a lawyer versus whether or not
22 the statute requires them to present him before a
23 Magistrate.

24 I mean that's what we're dealing with,

[]
1 whether or not good police work, in this sense, has got to
2 go by the wayside in favor of what the statute says and
3 whether or not he has a constitutional right to consult
4 with an attorney or with a Magistrate or with his parents
5 or with someone other than a juvenile surrounded by several
6 police officers in a police station.

7 And for me, the distinction here is
8 it's not that they were on a two-day trip and it was the
9 best time to do it or they should have done it then. I
10 mean by the time they took the second confession, they
11 could have been in Charleston. They were an hour and ten
12 minutes, seventy-some miles away. The purpose for the stop
13 in Parkersburg was to delay in order to get a confession.
14 I don't think there's any question about that.

15 The question in my mind -- and it's not
16 a question in my mind -- is whether that's in violation of
17 the statute in the Elsworth case, and I think it is. I
18 mean if they had him down here, they could have -- I mean
19 what do you do with a confession that you can't use? I
20 don't think it's a question of whether they should have
21 taken the confession and talked with him or not. It's can
22 it support a conviction or should it be suppressed at his
23 trial, and I think the statute requires that.

24 THE COURT: Again, I don't have the benefit of

1 having read these parts of the transcript. Does it appear
2 relatively clear that they've had no substantive
3 discussions in the car about Reggetz?

4 MS. LUSK: Well, Moss says they did.

5 THE COURT: That they did?

6 MS. LUSK: Moss says that they beat him all the
7 way to Parkersburg and that they systematically informed
8 him of the facts of the case and told him that he'd better
9 spit it out when they got to Parkersburg. But the troopers
10 say that that absolutely did not occur.

11 And the Supreme Court upheld the lower
12 Court's finding that the case on the admissibility on the
13 voluntariness that the Court made the right decision on
14 that, that the statements were voluntarily given.

15 Procedurally, your Honor, there's no
16 question that John Moss was a juvenile in October of 1980.
17 But he was, in fact, eighteen years of age.

18 And when we look at the Elsworth case,
19 Judge, you'll see that in Elsworth, even though the
20 statement is made about the purpose of delay being for a
21 confession, in Elsworth, the confession was admitted. It
22 was not suppressed. In the biggest number of cases which
23 cite Elsworth, the confessions are admitted, they're not
24 suppressed.

[]

1 In the Elsworth case, the person was
2 taken into the car, admitted he had been lying, then later
3 at the station, he was given his Miranda warnings, gave a
4 seven-page written statement, was taken to a Magistrate
5 approximately two and a half hours later, and they said
6 that was fine, that his confession started within an hour
7 of the beginning of the questioning. And that's really the
8 focal point that we have to look at, because there are so
9 many things, so many time frames, that if they don't count.

10 The transportation time doesn't count,
11 the booking time doesn't count, the time after the
12 confession being taken for arraignment doesn't count, the
13 time they may take him out -- and there's one case where
14 they take somebody out for four hours, search him for
15 evidence after the confession. The focal point is the
16 time.

17 THE COURT: Now you're talking about under this
18 statute or under the juvenile statute?

19 MS. LUSK: Under both the juvenile and the adult.

20 THE COURT: Well, you see, I think there's a
21 clear distinction. The forthwith requirement for the adult
22 statute has been held by our Supreme Court to mean any time
23 within six months technically, but you've got to
24 acknowledge that that statute has been construed very

1 liberally in favor of the law enforcement officer.

2 There's a distinction based on the
3 terms. Non only is there a forthwith requirement here, but
4 there's an immediate requirement also and it seems to me
5 like the Court has made the distinction, number one, based
6 upon that distinction of language that the Court ruled, but
7 also the Legislature made a distinction, because they said
8 no later than the next day.

9 MS. LUSK: Well, yes, Judge, but the cases cite
10 back and forth too. Elsworth is cited in the adult cases
11 and vice versa.

12 MR. REVERCOMB: And Moss is cited in adult cases.

13 MR. BICKLEY: The distinction here, your Honor,
14 in Elsworth, he was taken before a Magistrate two and one-
15 half hours afterwards. He was taken to a Magistrate.
16 That's why the confession was upheld.

17 THE COURT: Let me suggest that I have a serious
18 problem with the argument that the failure to take the
19 defendant promptly before a Magistrate for presentment
20 after he confesses invalidates the confession. It doesn't
21 make any sense.

22 MR. BICKLEY: But it wasn't invalidated in
23 Elsworth. In Elsworth, remember --

24 THE COURT: Now wait. But you've got a detour in

1 Elsworth. You don't go straight to the Magistrate. You go
2 straight to the police station and then to the Magistrate
3 in Elsworth. That's what you do in this case. The only
4 difference is, as I understand it, number one, that it's
5 further from Cleveland to Charleston than it was from Mr.
6 Elsworth's place of apprehension to the Magistrate, number
7 one.

8 And number two, there was a greater
9 amount of time both before and after the confession was
10 made in this case than there was in Elsworth. But that's
11 all. That's the only distinction.

12 MR. BICKLEY: They never went to a Magistrate.

13 THE COURT: In that case, in Elsworth, they went
14 to the police station in order to take down his confession.
15 They didn't go straight to the Magistrate and wait.

16 MR. BICKLEY: But they did go to the Magistrate,
17 though, in Elsworth.

18 THE COURT: Afterwards.

19 MR. BICKLEY: They never went to a Magistrate
20 here.

21 THE COURT: I don't understand how that makes any
22 difference at all. The validity of the statement can't
23 depend on the absence of the events that occurred
24 afterwards.

1 MR. BICKLEY: That's the whole basis for the 30th
2 of October suppression by the Supreme Court.

3 THE COURT: But in that case, you've got a
4 judicial day requirement that's past.

5 MR. BICKLEY: You say what?

6 THE COURT: He was taken into custody on the
7 28th. Anything that happens later than the next judicial
8 day after the 28th is invalid, by virtue of the statute.
9 Absolutely. That's what the judicial day requirement is
10 all about. That's what distinguishes the juvenile statute
11 from the adult statute.

12 MR. REVERCOMB: But only delay prior to his
13 confession can be said to have induced it.

14 THE COURT: Sure.

15 MR. REVERCOMB: Not afterward.

16 THE COURT: I think that Mr. Revercomb's correct.
17 The conduct after the confession could be egregious as
18 heck, and I can't imagine under what circumstances that's
19 going to -- it seems to me the key to your case is that, in
20 fact, he wasn't taken straight to the law enforcement
21 officers, that he was diverted in the course of that trip
22 for the purposes of obtaining a confession.

23 MR. BICKLEY: That's right.

24 MR. HUFFMAN: That's exactly right.

1 THE COURT: What happened after that doesn't make
2 any difference.

3 MR. HUFFMAN: In this case, it doesn't.

4 THE COURT: You're right on that point. Now
5 distinguish Elsworth for me. Tell me how Elsworth's
6 different. There isn't any question in Elsworth, is there,
7 that Mr. Elsworth didn't go straight past go; he went
8 straight to a Police Station before he went straight to a
9 Magistrate.

10 MR. HUFFMAN: The difference is in this case, the
11 purpose for the stop was to obtain a confession.

12 THE COURT: Why did they take him to the police
13 station in Elsworth?

14 MR. HUFFMAN: Because they were taking him for --
15 it was different. They just apprehended this fellow at the
16 scene of the crime. We're talking about a guy who's
17 already in jail, who's been under investigation for this
18 particular crime since January of 1980. The Prosecutor
19 knew what they -- the Prosecutor's office and the State
20 Police officers knew what they were talking to him about.
21 They spent a total of maybe fifteen minutes talking about
22 the crime that he was actually picked up on.

23 THE COURT: The malicious wounding?

24 MR. HUFFMAN: Yeah. He was never charged with

1 that. Nothing ever happened with that.

2 THE COURT: If you were a law enforcement officer
3 and you smell blood in a homicide, you're going to push
4 that a little harder than a malicious wounding, aren't you?

5 MR. HUFFMAN: And I agree.

6 MS. LUSK: Did you say he was charged with it?

7 MR. HUFFMAN: Was he?

8 MR. REVERCOMB: Yes, he was charged.

9 MS. LUSK: Yeah, there was a pending petition.
10 He was charged with that.

11 MR. REVERCOMB: That's what they went -- the
12 detainer was based upon juvenile petition for malicious
13 wounding.

14 MR. HUFFMAN: But nothing ever happened with
15 that.

16 MR. REVERCOMB: No, because that was held up for
17 prosecution of the homicide.

18 MR. HUFFMAN: He was here on the 30th. On
19 November the 2nd was whenever the detainer was issued on
20 the murder charge, and that's what everything has proceeded
21 on since that time.

22 MR. REVERCOMB: That's right. Your Honor, I
23 think Elsworth is pretty close to --

24 THE COURT: Well, that's not inconsistent with

1 the circumstances in this case. There's an indictment
2 against another fellow who's about ready to go to trial.

3 MR. REVERCOMB: That's right.

4 MR. HUFFMAN: And if you're a police officer and
5 you obtain two confessions from a fellow -- I mean at what
6 point do you stop investigating the crime? I mean
7 obviously, to them, they stop investigating when they don't
8 continue to question him. What we contend the failure was
9 is that they should have presented him before they
10 questioned him. And the fact that they didn't -- he should
11 have been presented before a Magistrate prior -- when he
12 was here, and then they could have questioned him all they
13 wanted after that. And any confessions they obtained after
14 that would have been admissible.

15 THE COURT: Let me get back to my earlier
16 question. Distinguish Elsworth in some material way from
17 this case.

18 MR. HUFFMAN: The time spent and the purpose for
19 the -- the time spent for a trip that took four hours with
20 a fellow who was already in custody, had already been
21 investigated, they knew what they were going to do with him
22 whenever they got him, and the sole purpose for the stop --

23 THE COURT: Now, was there any question in this
24 case that from Mansfield, Ohio, to Parkersburg, there's no

1 delay? The delay occurred when --

2 MR. HUFFMAN: That's right.

3 THE COURT: Okay, now, there's no question in
4 Elsworth that there was no delay between the time Mr.
5 Elsworth was apprehended and the time he got to the police
6 station, and he was diverted at the police station for the
7 purpose of taking his statement from him.

8 And all the rest of the delays that
9 you've got to complain about occurred after the confessions
10 in this case, with the exception of the second confession.
11 You have a bunch of time in there where he could have very
12 well been presented for whatever reason before a
13 Magistrate.

14 MR. HUFFMAN: I mean that basically is our
15 argument, that he was not presented.

16 MR. REVERCOMB: Your Honor, Elsworth is similar
17 in that what happened to Mr. Moss, when they picked him up,
18 after getting new information, I'm sure they took him
19 straight to the police department, told him they had some
20 new evidence. They didn't take him before a Magistrate.
21 He did confess, and they said, "That's fine."

22 MS. LUSK: Elsworth, your Honor, is often
23 followed in this -- there's a Mark E. P. case, which is a
24 case out of Mercer County, where a couple of boys tied a

1 woman to a bed and poured gasoline on the bed and burned
2 her. They were jointly transferred to adult status. And
3 the name of the case is Mark E. P., but with it is John A.
4 L. And the case was sent back -- reversed and sent back
5 for more suppression hearings in 1985, and then in 1987,
6 the Court suppressed Mark E.P.'s confession, holding that
7 he was in defacto arrest.

8 But the John A.L. confession, where
9 based upon Mark's confession, they had obtained a petition
10 against John A.L., they had probable cause to arrest him.
11 He was under actual arrest when they picked him up. They
12 took him to the police station and talked to him and he
13 started confessing in less than an hour and was
14 subsequently taken to a Magistrate. And they said that
15 that was all right too.

16 The facts are similar with this John
17 A.L.'s confession, as they are with the Elsworth
18 confession.

19 THE COURT: Do you have a cite on that case?

20 MS. LUSK: On rehearing, it's 363 SE 2d 729, and
21 I have a copy of it here, Judge, if you'd like to see it.

22 THE COURT: Yeah, I would, please. Let me ask
23 you essentially the same question except from a different
24 perspective. There isn't any question in this case that

1 the officers Smith and Williams diverted from the direct
2 route to the City of Charleston to get a confession, is
3 there?

4 MS. LUSK: Your Honor, but the diversion means --

5 THE COURT: No; wait a minute. As Judges are
6 known to say on television anyway, a simple yes or no will
7 do, and then you can explain your answer.

8 MS. LUSK: Well, they stopped. They did stop.

9 THE COURT: Well, I thought you just told me a
10 minute ago that the evidence of this case would be that the
11 officer says, "We want to talk to you about some much more
12 serious things --" --

13 MS. LUSK: Right.

14 THE COURT: -- "-- and it's a much more fitting
15 place to do that outside of this car in a nice, comfortable
16 police station that's warm" and that sort of stuff. They
17 had in mind to take him in an attempt to get a confession,
18 right?

19 MS. LUSK: Right.

20 THE COURT: So they were delayed in their
21 immediate presentment to get a confession.

22 MS. LUSK: True. They didn't change courses,
23 though. I mean it is in a direct line, the right road, in
24 other words. I mean they stopped at the first State Police

1 barracks they came to as soon as they crossed the West
2 Virginia line, and they were traveling on the same
3 interstate that they would have continued on to Charleston.
4 I mean they didn't take a route through Roane County or
5 anything.

6 MR. REVERCOMB: It's a lot like the Guthrie case,
7 your Honor.

8 THE COURT: Right.

9 MS. LUSK: And Elsworth focuses on the fact that
10 there's no circuitous journey.

11 THE COURT: I understand that. I understand
12 that.

13 MS. LUSK: Judge, this is the Mark E. P. and John
14 A. L. case. Now, I also have the first one where they
15 remanded it back, but this is the one where the Court
16 actually rules on the confession in 1987.

17 THE COURT: This is what I need. Let me ask you
18 this. I'm not inviting briefs. I, frankly, would just as
19 well, as soon, not have them. But if either of you wants
20 to submit something, I'll take it.

21 MR. BICKLEY: We will submit something.

22 MR. HUFFMAN: Judge, everybody's talking at my
23 back. Picking through the Elsworth case, the distinction
24 that is made, and I guess the same distinction on mine is

[]

1 the amount of time involved. If you'll look on page 509,
2 the Court specifically -- and the Court really doesn't give
3 a lot of reasons in this opinion as to why specifically it
4 didn't invalidate this particular confession. Actually, if
5 you read the Court's opinion all the way through, it looks
6 like they're ruling just the opposite until it gets to the
7 very end, except that if you look under Headnote 10, what
8 the Court really pegs on here is the amount of time, the
9 overall time that was involved.

10 THE COURT: I'm sorry. Are you talking about
11 Elsworth?

12 MR. HUFFMAN: Elsworth. Yeah, you were asking me
13 why is this particular situation different than Elsworth.
14 This is why I believe it's different. On page 509 it says
15 there at Headnote number 10 in the center of the page, the
16 reading starting with the second sentence there, "The
17 written statement was started approximately one hour after
18 the juvenile was first picked up. The record does not
19 disclose how long it took to transport him nor the exact
20 time period from the oral confession in the police cruiser
21 to the start of the written confession, but the interval is
22 clearly less than one hour." That's certainly not the case
23 here. He spent more than an hour in Parkersburg.

24 THE COURT: But that's only because it's a longer

1 distance.

2 MR. HUFFMAN: But he --

3 THE COURT: It has nothing to do with this.

4 MR. HUFFMAN: But I think that's the reason they
5 didn't invalidate it was because of the short period of
6 time involved. I think if there had been a longer distance
7 to travel and a longer period of time involved here, the
8 end result would have been different, although the opinion
9 may have been the same thing.

10 But in this particular case, we're
11 talking about a juvenile that's made a four-hour trip that
12 started at 3:00 in the afternoon and his second confession
13 didn't start until 9:30, or 9:22. I mean they spent more
14 than an hour in Parkersburg taking two confessions from
15 this juvenile. That, to me, violates what the statute says
16 and what the Elsworth case stands for.

17 THE COURT: The logic to that is they could never
18 get a valid confession if they drove cross-country.

19 MR. HUFFMAN: Well, your Honor, they need to take
20 the precaution necessary.

21 THE COURT: At the speed limit nonstop.

22 MR. HUFFMAN: But I mean I guess what we're
23 talking about is not what you're able to do as a police
24 officer to obtain a valid confession, although that's

1 obviously part of what the end result is, but what is
2 necessary to protect the rights of a juvenile and what's
3 the statute require.

4 THE COURT: Okay. My idea of immediacy is that
5 there be -- that the route be direct and without inordinate
6 or inappropriate delays along the way. Now, because it
7 took whatever it took, three hours, to get from Cleveland
8 to Parkersburg, does not add any delay that's greater than
9 the Elsworth case, because it's the direct route. I don't
10 see that as an issue in the case.

11 Frankly, what I see as the issue in
12 this case is that so far as I understand it -- and I, as
13 I've said, have not read the transcript -- is that he was
14 taken to the police station for the purposes of obtaining
15 a confession.

16 MR. HUFFMAN: That's exactly right.

17 THE COURT: Okay? And that created a delay. So
18 insofar as immediate means, they came straight away, he
19 wasn't taken straight away. But even though the Court has
20 used that language in Elsworth, the detour in Elsworth was
21 practically identical. The only difference is Mr. Elsworth
22 was picked up in the immediate vicinity of the offense and
23 the nearest Magistrate, and instead of taking four hours to
24 transport him, it took a matter of minutes. But the delay

1 is identical.

2 MR. HUFFMAN: Well, in the sense that a delay is
3 a delay, for however long it takes to go from point A to
4 point B when one happens to be longer than the other, yes.
5 But I think the purpose for the statutory section begins
6 with, you know, what immediately means for a juvenile are
7 different than what it means for an adult.

8 THE COURT: No question about it.

9 MR. HUFFMAN: Obviously, it's the result of the
10 circumstances weighing upon a juvenile and the seriousness.
11 In fact, I think there's a specific quote in the statute
12 that says the reasons for it to begin with is because when
13 there is a serious crime involved -- and you can't get more
14 serious than this -- the purpose is to protect the juvenile
15 so they don't give statements unless he's apprised of his
16 rights, and that's the question here.

17 THE COURT: I was there when the legislation was
18 passed. The notion is that a juvenile has got less of an
19 ability to make an informed judgment about making a
20 statement. That's all. I admit there ought to be a
21 greater protection extended. I don't think there's any
22 question about that. I think you're absolutely right.

23 Well, how much time do you want?

24 MR. HUFFMAN: We're looking at a trial date of

1 the 16th of April.

2 THE COURT: The sooner the better, because you
3 all are going to have to respond. Either the State is
4 going to have to react to no confession and the defense
5 gets the bonanza, or the defense is going to have to know
6 that you're going to have to defend in the presence of the
7 confession. So it seems to me the sooner, the better. I'd
8 like to give you as much lead time as I can. I intend to
9 give this case deference.

10 MR. BICKLEY: Monday, your Honor?

11 THE COURT: Oh, that's plenty. You can give it
12 to me a little later than that.

13 MR. BICKLEY: Well --

14 THE COURT: Okay, Monday's fine.

15 MR. BICKLEY: We don't want to wait too long.
16 And then we'll have two days to reply?

17 THE COURT: Let me suggest this.

18 MR. HUFFMAN: So do you want submission on Monday
19 and then two days to respond?

20 THE COURT: Yes.

21 MR. BICKLEY: Do what?

22 MR. HUFFMAN: He wants submission on Monday and
23 two days to respond.

24 THE COURT: Is that all right with you?

1 MR. BICKLEY: Yes. Is that all right, Neva?

2 MS. LUSK: Yes.

3 THE COURT: Okay, now, let me suggest this. Make
4 it easy on yourself. I don't think I need a lot of
5 narrative. If you've got a case that you think certain
6 points of the case are relevant, I'd just as soon have
7 that. Don't wear yourself out with a lot of argumentative
8 content. I really would just as soon have clean law and
9 how it applies. Okay. In the meantime, I'm going to ask
10 that the suppression hearing evidence and the transfer
11 hearing evidence be brought to me.

12 MS. LUSK: Judge, that may be a thousand pages
13 when you get down to it. It's a lot. Now, you'll find in
14 the suppression hearing that they were also focusing on
15 lots of other evidence. There is suppression testimony
16 relating to the seizure in Cleveland of the camera. There
17 is suppression evidence of the seizure of the blood, which
18 occurred in April.

19 THE COURT: Incidentally, I think I can read
20 through that. I assume there's a bunch of evidence about
21 the 30th confession too.

22 MS. LUSK: No, there isn't.

23 THE COURT: There isn't?

24 MR. REVERCOMB: No.

1 MS. LUSK: No, that was during voir dire in the
2 trial that that was discovered.

3 MR. REVERCOMB: We didn't know about the third
4 confession at that time.

5 THE COURT: It might not be here if it wasn't
6 used. Okay, is it correct that the same officers who took
7 this statement took the statement from Reggetz?

8 MS. LUSK: No, Woodrum took the statement from
9 Reggetz.

10 MR. REVERCOMB: Your Honor, I have some other
11 cases. Do you want me to wait and submit those?

12 THE COURT: Yeah, you might as well.

13

14 WHEREUPON, the hearing was adjourned.

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MOSS v. BALLARD
CASE NO. 2:09cv01406

RESPONDENT'S EXHIBIT 31

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

STATE OF WEST VIRGINIA

vs.

Action No. 82 F-221

JOHN MOSS, JR.

BEFORE: Hon. A. Andrew MacQueen

SUPPRESSION HEARING

April 13, 1990

4/13/90

Connie L. Cooke

Official Reporter

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FILED

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1 BE IT REMEMBERED, that on Friday, the 13th
2 of April, 1990, during the January 1990 Term of
3 said Court, in the matter of the State of West
4 Virginia versus John Moss, III, upon Action No. 82-
5 F-221, as stated in the caption hereto, upon a
6 Suppression Hearing, the following transpired:

7
8 THE COURT: The first thing I want to take
9 up is this letter that I received from Professor
10 Frank Cleckley at West Virginia University.

11 You've seen this; haven't you?

12 THE DEFENDANT: Yes.

13 THE COURT: He -- basically, the letter
14 raises his concern about this case going forward
15 because of some reservations apparently that you
16 have expressed to him about your lawyers in this
17 case. And he asks that either I postpone this
18 case or that I conduct a hearing to determine that
19 any fears about your counsel are unfounded, and I
20 want to take this up before we go any further,
21 because obviously this is a matter of some
22 substantial concern.

23 Do you -- in fact, are you concerned about
24 the work that your attorneys have done?

1 THE DEFENDANT: When everyone faces this
2 problem, after the conversation between myself and
3 my attorneys here, I talked to them yesterday, I
4 seem to believe that they have been working on my
5 case. But I was just misinformed about what they
6 were doing.

7 THE COURT: And you're satisfied that they
8 have adequately prepared to defend this case?

9 THE DEFENDANT: I believe at the
10 conversation that we had that they are prepared.

11 THE COURT: Okay. Do you have any
12 hesitation about going forward to trial set for
13 Monday, other than the fact that, obviously, nobody
14 looks forward to going to trial on a murder charge?

15 THE DEFENDANT: Excuse me, sir?

16 THE COURT: Well, obviously, nobody wants
17 to go to trial on murder charges, but there has to
18 be a trial in this case; are you satisfied that
19 it's all right to go forward on Monday?

20 THE DEFENDANT: If my counsel's ready,
21 your Honor. From things they told me yesterday,
22 they have been in touch with witnesses and they've
23 been getting things together.

24 THE COURT: Are you all ready to go

1 forward?

2 MR. BICKLEY: Yes, your Honor.

3 THE COURT: Do you have any hesitation
4 about going forward with these lawyers representing
5 you?

6 THE DEFENDANT: No, I don't.

7 THE COURT: Well, let's go on then. What
8 -- let me just ask you all, how do you expect your
9 case to be sequenced? What are you going to put on
10 in what order, roughly?

11 MS. LUSK: Well, one of the main
12 investigating officers; the medical examiner;
13 Reggett --

14 MR. BICKLEY: The medical examiner -- Dr.
15 Sopher?

16 MS. LUSK: Right.

17 MR. BICKLEY: Your Honor, I'd like to file
18 a motion in limine that Dr. Sopher concerned
19 himself primarily with the death of the victims,
20 and the time of death, and I fear that he may far
21 afield.

22 THE COURT: Let's take that up in just a
23 second. Let me this other stuff out of the way
24 first.

1 MR. BICKLEY: All right.

2 THE COURT: Okay. Who else?

3 MS. LUSK: Well, we've got an employee of
4 the A&W where Reggett came in and asked that they
5 call the law, that his wife had been murdered.

6 We've got a friend of the Defendant's;
7 that friend's mother, whom he had given a Christmas
8 gift to; a fingerprint expert; a firearms expert --

9 MR. REVERCOMB: A serology expert.

10 MS. LUSK: A serology expert.

11 THE COURT: My understanding, by the way,
12 is that because of the degradation in the blood
13 samples, that it was impossible to do DNA testing?

14 MS. LUSK: Right.

15 There are three short jail house
16 confessions.

17 THE COURT: Made to other inmates?

18 MS. LUSK: Yes, sir.

19 THE COURT: Here?

20 MR. REVERCOMB: Here and in the
21 penitentiary.

22 THE COURT: Well, the one in the
23 penitentiary, I take it, then, was not something
24 that was disclosed at the original trial?

1 MS. LUSK: That's right.

2 MR. REVERCOMB: None of them --

3 MS. LUSK: None of them were. There is a
4 State Police diving expert, who dove where Reggett
5 told them he threw the guns on the way to work.

6 THE COURT: And he's just going to testify
7 that he didn't find them?

8 MS. LUSK: Yes; he's testified before.

9 THE COURT: Well, you're obviously going
10 to put the Officers on who have the confessions;
11 right?

12 MS. LUSK: Yes. That's all I can think
13 of, off the top of my head.

14 THE COURT: If cross-examination is equal
15 in time to direct examination, how long do you
16 think it would take?

17 MS. LUSK: If it equaled? Oh, Lord.

18 MR. REVERCOMB: I'd say we have five
19 anchor witnesses who are going to take a while.
20 The rest of them will be relatively short. And the
21 long witnesses will be long. I'd expect that maybe
22 one of them may take a day.

23 MS. LUSK: Just the direct.

24 MR. REVERCOMB: Well, it may not be that

1 long, but it may be.

2 THE COURT: So, if you put it all
3 together, what are you looking at?

4 MS. LUSK: I would say our case would take
5 probably at least four days, with no cross-
6 examination.

7 THE COURT: With no cross? Okay.

8 MS. LUSK: At least four days, with no
9 cross-examination.

10 THE COURT: Okay.

11 MS. LUSK: Maybe longer.

12 THE COURT: Okay; now how has discovery
13 gone? Do you have, to your knowledge, everything
14 that you need? Have you been exposed to everything
15 they have?

16 MR. BICKLEY: They have disclosed
17 everything, your Honor. They gave us some things
18 this morning that we should know.

19 THE COURT: Is there any evidence, new
20 evidence, from the time of the first trial, other
21 than those three statements, the jail house
22 confessions?

23 MS. LUSK: I don't think there are any --
24 that's the only new witness.

1 THE COURT: The reason I ask that
2 question, obviously if Defense counsel have had the
3 opportunity to read the transcript of the first
4 case, that is going to provide substantial
5 discovery.

6 MS. LUSK: Sure.

7 THE COURT: If there is material
8 extraneous to that post-trial, I want to find out
9 if they know it.

10 Is there anything in there other than
11 those statements that you can think of?

12 MR. REVERCOMB: No, your Honor. We have
13 not yet received any written answers from them no
14 our discovery. They say they're going to have an
15 alibi defense, and we've not received anything on
16 that.

17 MR. BICKLEY: That's my fault, your Honor.
18 We have an alibi defense, which is basically the
19 same defense. We did inform them, and I'm remiss,
20 we just haven't had an opportunity to -- we're
21 utilizing the same witnesses, and we just decided
22 last night, or the night before last, that we are
23 going to use a psychiatrist, or we're thinking
24 about using a psychiatrist. We're going to use Dr.

1 Massenburg. At least, I'm going to talk to him
2 this weekend and see if he can help us; if not,
3 then -- but you're on notice that we --

4 THE COURT: In what kind of defense?

5 MR. BICKLEY: He is going to evaluate the
6 two confessions for us and give us the benefit of
7 his expertise as to the propensity of one person
8 vis-a-vis another, as to the type of confession.

9 THE COURT: You say both confessions, your
10 client's and Reggett's?

11 MR. BICKLEY: Right. My client's and Mr.
12 Reggett's both.

13 THE COURT: Okay. This Massenburg, who is
14 he?

15 MR. BICKLEY: He's with Dr. Smith.

16 THE COURT: He's a psychiatrist?

17 MR. BICKLEY: He is a psychiatrist.
18 Psychiatric Group is the name of --

19 THE COURT: Okay.

20 MR. BICKLEY: And I will have to get an
21 Order in to you to authorize that so he can be
22 paid.

23 THE COURT: Has he reviewed these
24 materials to this point?

11

1 MR. BICKLEY: He has not. I'm making a
2 copy -- I called him yesterday to see if he was
3 available in forensic psychiatry, and both he and
4 his partner is. So, he asked me -- he couldn't
5 give me an answer one way or another until he could
6 find out what the problem is or what I wanted or
7 what could I provide. And he wouldn't make any
8 statement -- he wouldn't commit himself as to
9 whether or not he could provide me with what I
10 wanted to use in the two confessions, or the
11 confessions of the two individuals.

12 THE COURT: Okay. Well, you need to
13 disclose those in case he has an opinion -- if he
14 expresses one.

15 MR. BICKLEY: I will do that, your Honor.
16 I'll give that to the State as soon as I find out.

17 THE COURT: But you are going to use an
18 alibi defense? You're going to use the same
19 witnesses, the same --

20 MR. BICKLEY: An alibi, yes, and the same
21 witnesses -- that's the same defense they had the
22 last time.

23 MS. LUSK: Judge, that's really going to
24 be putting us in a position of being an expert

12

1 short, though. You know, we may find out on
2 Saturday, or Easter Sunday, that they've got an
3 expert to testify in the case when we don't have
4 the opportunity to ask for an expert of our own.

5 THE COURT: Oh, I think there's got to be
6 a rebuttal witness.

7 MS. LUSK: You're going to talk about him
8 interviewing your client?

9 MR. BICKLEY: No. He's just going to look
10 at the confessions.

11 MR. REVERCOMB: That's another problem,
12 Judge. It's one thing to look at a summary
13 confession of Paul Reggett, just a summary; but on
14 the other hand, you have a taped confession, or
15 what purports to be a taped confession of John
16 Moss. I mean, that's a different -- I don't
17 understand how a psychiatrist can --

18 MR. BICKLEY: Well, do you all have
19 another copy of that taped confession? We have a
20 transcript of it, but --

21 MS. LUSK: No.

22 MR. REVERCOMB: The original is stored
23 with the evidence in the previous case downstairs
24 in the Clerk's office.

1 MR. HUFFMAN: I would think there ought to
2 be more than one copy of a tape.

3 MS. LUSK: Well, see they monkeyed with
4 the tape at the first trial. Remember? They took
5 out the word "reformatory" so that the jury
6 wouldn't hear that they had been to the reformatory
7 in Ohio. So, there is an edited tape that was
8 actually played for the jury that is evidence
9 downstairs, which is different than the original
10 tape. The original tape was on two sides. You
11 know, they played one side, finished it up, turned
12 it over -- there was a portion of that tape that
13 had been used in the Parkersburg Detachment, that
14 had some stolen property reports that had been
15 taken over the telephone, and that has nothing to
16 do with this case. And then the confession was
17 completed on the back side of that tape.

18 For the trial in 1984, they took that tape
19 -- I don't know if it was to the State Police, or
20 where, but they had it copied and had the word
21 "reformatory" omitted from the confession. It is
22 now contained on one side of a new tape.

23 So, there is two tapes, but they are both
24 downstairs.

1 THE COURT: You mean, downstairs in the
2 Clerk's office?

3 MS. LUSK: In the Clerk's office.

4 THE COURT: Okay.

5 MS. LUSK: But if you're asking if we have
6 one that you can send to Dr. Massenburg; no, we
7 don't.

8 THE COURT: If you need to copy that, I
9 can make arrangements through the Clerk's office to
10 assist you in getting that.

11 MR. BICKLEY: All right, your Honor.

12 MS. LUSK: I had also told you, Tim, that
13 I thought we had that three-quarter inch WSAZ tape.
14 The tape we have is not that tape. We took --

15 MR. REVERCOMB: That's an audio tape of
16 his confession.

17 MS. LUSK: Well, that's true. But it's a
18 three-quarter inch tape.

19 We had in our file, and of course there is
20 no -- that WSAZ tape is not in evidence. It is not
21 downstairs; it was never even marked. It was
22 played for the jury in 1984, but it was not
23 admitted as an exhibit. It was a twenty-eight
24 second spot of how bad Reggettz looked when he was

1 arraigned. And it was played for the jury; but the
2 tape itself was not admitted.

3 And we found in one of the boxes having to
4 do with this case, a three-quarter inch WSAZ tape.
5 We assumed that that is what that was.

6 MR. REVERCOMB: In our office.

7 MS. LUSK: In our office. And we took it
8 over to WSAZ, and it's not.

9 MR. BICKLEY: It's not?

10 MS. LUSK: No. It's a three-quarter inch
11 -- it's an SAZ tape, but the first twenty-some
12 minutes of it have no picture at all, and it's
13 obviously a tape they just put the camera and
14 turned the visual off, and recorded the confession
15 of John Moss as it was played in the Courtroom, so
16 that they could take it and use a little bit of it
17 and play it on the news.

18 And then there is at the end of that, Arch
19 Moore announcing that he is running for Governor in
20 1984.

21 But anyway, it has nothing to do with
22 anything that transpired in 1979. So, I don't know
23 --

24 THE COURT: I take it that that tape was

1 something that the State put on?

2 MR. REVERCOMB: It's not in evidence.

3 MS. LUSK: No, it wasn't in evidence. Oh,
4 oh, the Reggettz tape? No; Parrish put that on.

5 THE COURT: Why?

6 MR. REVERCOMB: To show how bad he looked.
7 He had been up for fifty-nine hours, and he looked
8 disheveled and --

9 THE COURT: What difference would that
10 make?

11 MR. REVERCOMB: They were trying to make
12 Paul look bad.

13 MS. LUSK: And he looked bad, evidently,
14 although we haven't seen the tape.

15 THE COURT: Okay. Is that something that
16 you want?

17 MR. BICKLEY: We might want to look at it.
18 I'll --

19 THE COURT: Do you know where it is?

20 MS. LUSK: No. Like I said, I thought we
21 had it. We just found this three-quarter inch
22 tape, and I assumed that that is what it was.

23 MR. BICKLEY: We thought it had been put
24 into evidence downstairs, and we looked in the

1 exhibit box.

2 MS. LUSK: It's not admitted. It's not --
3 it was never even numbered. I went back and looked
4 at the two witnesses who testified about it. They
5 were the custodian of the tape, and then they
6 brought in the reporter, I think, who was present
7 when the tape was made, and the tape was never even
8 marked. It was just played.

9 THE COURT: Who tried the case with Mike?

10 MS. LUSK: Pete.

11 MR. BICKLEY: No, Pete and Stuckey tried
12 that case.

13 MS. LUSK: It wasn't Pete and Mike.

14 THE COURT: Have you asked Pete if he
15 knows where it is?

16 MS. LUSK: Have you asked him, Steve? I
17 don't think I've asked him.

18 MR. REVERCOMB: No.

19 MS. LUSK: I intended to, but I --

20 THE COURT: Why don't you do that and see
21 if he has any recollection at all. At least let
22 them look at it.

23 MR. REVERCOMB: Your Honor, there is one
24 question about a piece of additional evidence. I

1 filed and served on Mr. Bickley yesterday a notice
2 of our intent to use the statement of Carlton Moss.
3 He is on our witness list.

4 THE COURT: Now, who is Carlton Moss?

5 MR. REVERCOMB: That is John Moss's
6 brother.

7 THE COURT: Okay.

8 MR. REVERCOMB: We've tried to locate him
9 and I have a motion here to use it, and it's sort
10 of a memo of facts to support my motion. I would
11 like to file this with the Court and give you this
12 copy.

13 THE COURT: You gave me mine.

14 MR. REVERCOMB: We intend to call him as
15 a witness if we can find him. But if we can't find
16 him -- back in '84, we attempted to have him served
17 as an out-of-state witness and he was able to avoid
18 process.

19 THE COURT: When the case was originally
20 tried?

21 MR. REVERCOMB: Right. He gives a very
22 important statement, and we would like to have him
23 here.

24 THE COURT: Okay. Was that put in in the

1 first case?

2 MS. LUSK: Huh-huh. It wasn't attempted.

3 MR. REVERCOMB: It wasn't attempted, they
4 just simply tip-toed around it somewhat. I guess
5 a hint of it came in.

6 THE COURT: Whose statement do you have?

7 MR. REVERCOMB: It's a fairly long
8 statement and very detailed about the elaborate
9 steps --

10 THE COURT: I mean, to whom was it given?

11 MR. REVERCOMB: It was given to the Police
12 back in 1980, October 30th, 1980.

13 THE COURT: What do you have, a tape-
14 recording of the statement?

15 MR. REVERCOMB: No; it's a signed
16 statement, actually.

17 THE COURT: A written statement?

18 MR. REVERCOMB: Uh-huh.

19 THE COURT: What do you do about the
20 confrontation part of it?

21 MR. REVERCOMB: Well, it's written and
22 signed, and it may have been typed and signed, too.
23 I'm not sure.

24 MR. BICKLEY: I haven't seen the

1 statement. Are you going to show us the statement?

2 MR. REVERCOMB: Yeah.

3 MR. BICKLEY: When will we get to see it?

4 MR. REVERCOMB: Do you want it now?

5 MR. BICKLEY: Yes, I'd like to have it
6 now.

7 MR. REVERCOMB: Here it is; it's signed by
8 Carlton Moss. It's a typed statement.

9 THE COURT: Is that another copy? You say
10 this is the Defendant's uncle?

11 MS. LUSK: Brother.

12 THE COURT: How do you get around the
13 confrontation? Is that something you want to
14 object to?

15 MR. BICKLEY: Yes, sir. Very definitely.

16 MR. REVERCOMB: Well, your Honor, under
17 804(b)5, I'd have to look at that rule, you may
18 want to read my memo, but obviously, you do have a
19 confrontation clause issue. But I think that's the
20 whole purpose of 804(b)5, is there a submission in
21 any hearsay, any hearsay --

22 THE COURT: 804 just deals with hearsay.

23 MR. REVERCOMB: It's 803 does too; the
24 basis of all hearsay exceptions is trustworthiness.

1 803 is whether the declarant is available or not.

2 The question is whether it is trustworthy.

3 THE COURT: I'm not -- the Rules of Civil
4 Procedure don't purport to deal with the issue of
5 confrontation. It just gives the definition --

6 MR. REVERCOMB: Yeah, but the Rules of
7 Evidence do.

8 THE COURT: I understand that. But the
9 Rules of Evidence don't purport to address any
10 constitutional issues with definitions.

11 MR. REVERCOMB: There is some case law on
12 that, your Honor. I'd have to find it, but
13 obviously, the question has come up before. And
14 the Rules of Evidence and case law hold that you
15 can let in statements under these circumstances.
16 I'm sure those cases discuss the confrontation law.

17 THE COURT: Yeah; the Fourth Circuit does,
18 but I don't think it's a very reliable case.

19 MR. REVERCOMB: Well, we have some cases
20 here.

21 THE COURT: In West Virginia?

22 MR. REVERCOMB: On 804(b)5.

23 THE COURT: That would justify putting
24 this confession in?

1 MR. REVERCOMB: Yes.

2 THE COURT: Well, you ought to bring it to
3 my attention, because I'm not disposed to allow it
4 in at this point.

5 MR. REVERCOMB: Another thing, your Honor
6 --

7 THE COURT: Frankly, I think it's an error
8 in the case that you don't need.

9 MR. REVERCOMB: Well, I don't want to use
10 this; I want to use Carlton Moss's. They know
11 where he is, probably. They could find him.

12 My problem is we've been looking to find
13 him, and we've dealt with the Prosecutor up in
14 Cleveland, the Police Department up there. We've
15 been looking for him for some time.

16 His father and some other members of his
17 family live in Cleveland. They've come down here
18 to visit. I don't know if Carlton comes with them,
19 but I know he has another brother that does. But
20 if they know where Carlton is hid, and if he'll
21 come in and testify, fine.

22 We're trying to serve; we're trying to
23 serve him.

24 THE COURT: Well, if you've got some case

1 law, bring it in and we'll take that up again, but
2 at this point, I'm --

3 MR. BICKLEY: Will you share the case law
4 with us, Counselor?

5 MR. REVERCOMB: I'll be glad to.

6 THE COURT: What else do you have that you
7 want to take up?

8 MS. LUSK: Well, we have the --

9 THE COURT: Let me ask you, do you all
10 have any questions that you want posed to the jury
11 in voir dire, either as a group or in an
12 abbreviated individual voir dire?

13 MS. LUSK: Judge, I know we will. We
14 started working on that this morning, and kind of
15 got side-tracked. We just need to get it all
16 together. We want to ask if they have children;
17 individually, we would like to ask them the
18 question whether they could find a verdict of
19 guilty without a recommendation of mercy, if the
20 evidence justified it and the case was proved,
21 knowing that the defendant would spend the rest of
22 his life in jail, in the penitentiary.

23 THE COURT: Anything else?

24 MS. LUSK: And Steve was talking this

1 morning about perhaps asking them a question about
2 the fact that the case is very brutal, you know, if
3 they could sit on the case knowing that it's a very
4 brutal killing.

5 THE COURT: Why don't you reduce those to
6 writing and share copies with counsel for the
7 defense and we'll take those up, the specific
8 language of any of those questions. What I would
9 propose to do is to just take whatever brief
10 questions there are and ask them myself, both the
11 State's and the Defendant's, and then allowing each
12 of you to follow up on any responses you get.

13 An area where I have a particular concern
14 is the pretrial publicity, number one. And I think
15 if either side would rather ask your own questions,
16 I will allow you to do it. But frankly, the reason
17 I proposed to ask them myself is because I think
18 you can probably get a frank answer, number one;
19 and number two is, we're not going to identify the
20 source of the question so that if they do sense
21 something sensitive, the jurors are not going to be
22 made any anybody particular.

23 MR. BICKLEY: We'll reduce ours to writing
24 also, your Honor.

1 THE COURT: And I'm going to ask for those
2 a little later.

3 What else do we have that we need to take
4 up, from the State's point of view, in pretrial?

5 MS. LUSK: Well, your Honor, we had a
6 couple of questions about in limine, about
7 statements that Vanessa, who is deceased, the wife
8 and mother, made against her husband to relatives
9 of hers, which the husband at the time of the last
10 trial didn't remember, didn't have any knowledge
11 of, and which can't be proven up, obviously.

12 THE COURT: How did they come in?

13 MS. LUSK: Cross-examination of Reggett.

14 THE COURT: Did it? And he was asked,
15 Isn't it true that your wife said that you all were
16 having trouble four years ago or eight years ago,
17 or something like that?

18 MS. LUSK: Right.

19 THE COURT: And he said he said no?

20 MS. LUSK: He said -- well, it was
21 questions like, Isn't it true that Vanessa said you
22 have a split personality, that you were evil around
23 her and then in public you were real nice? And
24 he'd say, I don't know if she ever said that.

1 They asked questions, Well, isn't it true
2 that -- let me refer back here -- "Isn't it true
3 that a couple of days before the murders, you ran
4 her and the kids out of the house and told her that
5 if they didn't get out, you were going to kill
6 them?"

7 He says, "I don't remember telling them
8 anything like that."

9 And, "Isn't it true that you told your
10 son, Paul Eric, you wished he was never born?"

11 He says he doesn't remember anything like
12 that.

13 There were remote instances, too, Judge,
14 that -- "Isn't it true that your son, who was
15 almost eight years old at the time of his death,
16 when he was a teeny baby," you know, when he was an
17 infant, so this is seven years earlier, "isn't it
18 true that once he had a real bad rash and he was
19 crying a whole lot and you said he was driving you
20 crazy, and left the house?"

21 You know, it's our position that that just
22 doesn't reflect on anything. Not to mention the
23 fact that it's remote. But he said --

24 THE COURT: But he didn't affirm any of

1 that?

2 MS. LUSK: No. I mean, there's plenty of
3 things that he did affirm.

4 THE COURT: Yeah.

5 MS. LUSK: There's lots of ammunition that
6 he affirmed.

7 THE COURT: Is that to show that he lied?

8 MR. REVERCOMB: What's that?

9 THE COURT: Any of those questions?

10 MR. BICKLEY: I'm sorry, Judge, I missed
11 that.

12 THE COURT: All of that stuff Reggett
13 said he didn't remember saying, things like --

14 MR. HUFFMAN: Well, I think there's a big
15 difference between asking him those questions, and
16 offering some evidence that at least he said that
17 by another witness.

18 THE COURT: Oh, yeah, I know. Yeah. I
19 think there is a definite difference.

20 MR. HUFFMAN: I mean, I don't think those
21 were necessarily improper questions for cross-
22 examination.

23 MR. REVERCOMB: Well, if you know he's --

24 THE COURT: Wait a minute. I think

1 there's a serious problem with asking a question
2 that carries with it some suggestion or implication
3 that you know that he's not going to answer yes to,
4 but you can't prove.

5 MR. HUFFMAN: But they did offer evidence;
6 they did offer somebody --

7 MS. LUSK: No, they didn't.

8 MR. HUFFMAN: You offered -- there were
9 two witnesses who testified that the sister or
10 cousin of the deceased lady --

11 MS. LUSK: Well, they testified to --

12 THE COURT: I have no problems whatsoever
13 with that material if you're going to connect it,
14 but I remember the time Joe Perry was trying --

15 MR. HUFFMAN: Oh, I understand that --

16 THE COURT: -- a case down here that was
17 completely off the wall --

18 MR. HUFFMAN: It gives us license then, in
19 cross.

20 MS. LUSK: There are instances which you
21 can prove up. I mean, there's an incident about a
22 television, which there was a witness to. And if
23 that was denied or he said he didn't remember, you
24 could actually prove that up.

1 What I'm talking about are things that
2 Vanessa told people, that there was nobody else
3 present for.

4 MR. HUFFMAN: Well, right here, she
5 testified about the baby was crying and --

6 MS. LUSK: Well, she did, but that was
7 eight years earlier. My objection is that it was
8 remote, that the baby was an infant --

9 MR. HUFFMAN: Now, it's going to be ten
10 years earlier; I mean, now, everything's going to
11 be earlier.

12 MS. LUSK: It was eight years before the
13 killing.

14 MR. HUFFMAN: Right.

15 THE COURT: I would be inclined to let
16 that in; I think the remoteness goes to weight.
17 But I do have some problems with questions being
18 asked that you can't follow them up with evidence.

19 MR. REVERCOMB: There are a lot of
20 questions like that, Judge.

21 MS. LUSK: Because the only person that
22 was present was Vanessa and the children.

23 THE COURT: Oh, I understand that; I
24 understand that.

1 To the extent that there are questions in
2 there that have some adverse implications to them,
3 and you know that Mr. Reggett is not going to
4 indicate knowledge, don't ask any of those
5 questions.

6 MS. LUSK: Judge, there is also the
7 question about whether the defense can introduce
8 Moss's prior denials of the killings.

9 THE COURT: I'm going to look at that. My
10 inclination is to believe that they are entitled to
11 do it, notwithstanding the self-serving nature,
12 because they are inconsistent with the admissions.
13 But they're position has to be that his admissions
14 are not credible, or that he didn't make them.
15 Under either set of circumstances, it would seem
16 that prior denials are consistent with that
17 position. But I want to take a look at it.

18 MS. LUSK: And in the even that you
19 permitted them to use them as a prior inconsistent
20 statement, you would give a limiting instruction
21 that they aren't offered for the truth, or --

22 THE COURT: Now, wait a minute. The Rule
23 says, the party ... they are not offered or
24 received except in the instance of a bargain.

1 That's not the exact language, but that's close.

2 MR. REVERCOMB: Where the parties are --

3 THE COURT: I hardly think it makes any
4 difference in a case of prior denials in this case,
5 because credibility is really what they are talking
6 about.

7 MR. REVERCOMB: Isn't that where the
8 parties testify about it, subject to cross-
9 examination?

10 THE COURT: You can't force him to go to
11 the stand.

12 MR. REVERCOMB: Obviously not.

13 THE COURT: I don't know how you would get
14 that without him volunteering it.

15 Let me say this, I'm just going to look at
16 the law on that. I'm going to find out. I think
17 it will be easy enough for me to look up over the
18 weekend.

19 But you're obviously going to work with
20 those assumptions?

21 MR. BICKLEY: Yes, yes, without any
22 question.

23 MR. REVERCOMB: And there also may be a
24 distinction between those statements, self-serving

1 statements made to a Police Officer under
2 questioning, and those made to a relative. I'm
3 sure there's a --

4 THE COURT: Well, let me look and see.

5 I mean, I don't frankly think that those
6 made to a Police Officer carry any greater or less
7 probative value.

8 MR. REVERCOMB: Well, it's simply -- you
9 may have a Police officer on the stand and cross-
10 examine him, if you allow it, to the prior denial,
11 and that's different from allowing them to put on
12 a witness, I think, just to elicit a self-serving
13 statement.

14 Do you understand the distinction I'm
15 arguing? They may not be true, but to me, in my
16 mind, there is a difference.

17 They, in their case in chief, can put on
18 a relative to say, yeah, we were playing cards, or
19 something, and --

20 THE COURT: And in fact, there was some
21 evidence to that effect?

22 MR. REVERCOMB: Right.

23 THE COURT: Some casual conversations?

24 MR. REVERCOMB: Yes.

1 MS. LUSK: Well, we'll look at it, too,
2 Judge. I don't understand how --

3 THE COURT: If you all find anything that
4 I don't --

5 MS. LUSK: But Judge, though, in any case
6 where there was a confession, the defendant could
7 admit a year's worth of exculpatory statements
8 because there is a confession, something that he
9 couldn't do if there was no confession.

10 THE COURT: I understand what your
11 position is. I'm just going to look at it this
12 weekend.

13 MS. LUSK: Okay.

14 We did receive a phone call, Nelson, from
15 J. R. Smith, who you've evidently had a subpoena
16 served on. He's not served, though. They
17 delivered this subpoena to the detachment. He's
18 retired, but he did call. He has a trip out of
19 town planned the second week of trial. His son is
20 graduating from -- I don't think he's graduating
21 from a service academy, I think he's graduating
22 from boot camp, or something, but he's driving to
23 Missouri. He's scheduled to leave on Tuesday and
24 be back on the weekend, so he would be available

1 all of next week and the following Monday, if we
2 can accommodate him. I might suggest that if you
3 really want to call him, that we would ask
4 permission of the Court to let you call him out of
5 order, you know, if we haven't rested our case,
6 that perhaps we can get him out of the way and let
7 him go see his son graduate.

8 MR. BICKLEY: Are you going to call him
9 back with what we decide?

10 MS. LUSK: Yeah.

11 MR. BICKLEY: Okay. That would be all
12 right.

13 MS. LUSK: To call him out of order, if
14 need be?

15 MR. BICKLEY: Yes. He's coming back next
16 week; right? I mean, he'd going next week?

17 MS. LUSK: No.

18 THE COURT: He's going to be gone the week
19 after next.

20 MS. LUSK: He's going to be gone when you
21 need him.

22 MR. BICKLEY: Okay.

23 MS. LUSK: He'll be here the first week
24 and the Monday of the second week.

1 MR. BICKLEY: Why don't we call him and
2 tell if we're going to use him, we'll use him next
3 week --

4 MS. LUSK: Use him out of order?

5 MR. BICKLEY: -- and that we will get
6 together and decide what is the best time to call
7 him.

8 MS. LUSK: Or even Monday. He'd be
9 available Monday for you.

10 MR. BICKLEY: Let's make it Monday then.
11 That would probably be a good time for me anyway.
12 I can make a commitment on that one.

13 MS. LUSK: Okay.

14 MR. REVERCOMB: Something else, Nelson,
15 let me ask you -- Sgt. Woodyard called this
16 morning, and I understand you've subpoenaed him.
17 You've subpoenaed him for Monday, the 16th, and he
18 wanted to know if he has to be here that day?

19 MR. BICKLEY: No, but just when we
20 subpoenaed him, that's when I thought -- I executed
21 for everybody on the 16th. But the people in
22 Cleveland, I'm advising them, that unless they just
23 want to come down, that it's not necessary, and I
24 will let them know when I think your case is about

1 to wind up for them to come down.

2 MS. LUSK: Have you got Carlton coming?

3 MR. REVERCOMB: Do you have a list of
4 witnesses? Would you give us one?

5 MR. BICKLEY: Yeah, I'm going to give you
6 a list. It's the same list, with the exception of
7 Jerome Massenburg, it's the same list that Parrish
8 McKittrick had.

9 MR. REVERCOMB: Well --

10 I understand that I should have given you
11 a list --

12 MR. REVERCOMB: Here we are the Friday
13 before trial and we don't have any notice --

14 MR. BICKLEY: I apologize. You know this
15 is an alibi defense; the same defense there was the
16 last time.

17 MR. REVERCOMB: We don't know that until
18 we see the list of witnesses you've issued.

19 MR. BICKLEY: You have our word, your
20 Honor, the Court has it in the Court records; it's
21 an alibi defense.

22 MS. LUSK: Judge, there was also -- if we
23 call Rudy O'Dell, who was the polygraph examiner,
24 obviously, part of the problem with this retrial is

1 when the State called O'Dell last time -- he's now
2 retired -- but if he is to testify -- he testified
3 about Reggett's state before he administered the
4 polygraph examination.

5 Now, the State didn't elicit, and wasn't
6 going to elicit, any evidence regarding the
7 examination or even the fact that they were about
8 to conduct one. The defense got up and elicited
9 that he was about ready to perform a polygraph
10 examination on Reggett.

11 MR. REVERCOMB: To assess that as a
12 polygraph examiner he's seen a lot of people break
13 down and cry when they know they're going to take
14 a polygraph. And of course, they went on, and they
15 went into the merits, or what actually happened
16 during the polygraph examination.

17 MS. LUSK: And then the later one, when he
18 was exonerated and released from jail.

19 We'd like to call O'Dell again. But we
20 obviously don't want to elicit any evidence
21 regarding the polygraph; we didn't want to the
22 first time around, either. And we just throw this
23 out, I guess, to get some kind of understanding
24 about --

1 THE COURT: Won't that be self-serving as
2 to him.

3 MR. HUFFMAN: No, no. If you're asking
4 with regard to cross? I mean, that's what he was
5 put on for, to say that Reggettz cried when he --

6 MR. REVERCOMB: But we're not going to ask
7 him why, if we don't let the polygraph come in.

8 THE COURT: How is it relevant?

9 MS. LUSK: Well, I think he would also
10 testify that he was absolutely exhausted, that he
11 was just -- you know, his physical state, as well,
12 right before he confessed.

13 THE COURT: The day of his confession?

14 MR. REVERCOMB: Yes, twelve hours after he
15 was taking into custody, after he had gone to the
16 detachment.

17 MS. LUSK: And like an hour before he
18 confessed at 2:30 in the morning.

19 It's consistent with Reggettz's testimony
20 that he was just beat; he was just absolutely
21 exhausted. He was going to tell them anything they
22 wanted to hear.

23 THE COURT: That's all you want to put on?
24 Just as to his physical condition?

1 MR. REVERCOMB: Yeah, that he cried.

2 MS. LUSK: Yeah, that he was crying and --

3 MR. HUFFMAN: Are you going to ask him
4 what he does for a living, that he's a polygraph
5 operator, or anything like that?

6 MR. REVERCOMB: No.

7 MS. LUSK: He's retired.

8 MR. HUFFMAN: Are you going to ask him if
9 he's a retired polygraph operator?

10 MS. LUSK: No.

11 THE COURT: Nobody wants to start over
12 again and have to call it quits and pull another
13 jury.

14 MR. REVERCOMB: Oh, I understand that.
15 And Parrish McKittrick argued, and it's not in the
16 record -- I guess he just convinced Judge Hey that
17 it was permissible for him to ask -- or to give the
18 reason that he cried was that he was about ready to
19 take the polygraph examination.

20 MS. LUSK: Of course, then his next
21 argument was that after you took the polygraph
22 examination, you went to jail? The obvious
23 implication was that he flunked the polygraph and
24 went on to jail.

1 And then, of course, the State wanted to
2 get in the fact that he took another polygraph
3 examination when he was in much better shape, later
4 in the year, and that after he took that polygraph
5 examination, he got out of jail.

6 MR. REVERCOMB: And when they threw him in
7 jail that night, he didn't want to run anyway.

8 MS. LUSK: You know, it was just like a
9 big boulder running down the mountain, and he just
10 lost control of the whole thing.

11 MS. HUFFMAN: Excuse me, this is in the
12 line of error.

13 THE COURT: Putting him on in the first
14 place?

15 MR. BICKLEY: Yes.

16 THE COURT: Isn't the evidence relevant?

17 MR. BICKLEY: That he was crying -- but we
18 have the --

19 THE COURT: That he was -- but that's just
20 part of his general physical condition description;
21 isn't it?

22 MR. REVERCOMB: We have to explain why,
23 you know, we have to offer some explanation to the
24 jury why he confessed, or how he --

1 MS. LUSK: Well, and it also corroborates
2 him, that he was just absolutely --

3 MR. HUFFMAN: Well, you can get the
4 polygraph operator to testify that he saw him
5 crying also.

6 MS. LUSK: No, he's the only one.

7 MR. BICKLEY: Were the Police in there?

8 MR. REVERCOMB: No.

9 MS. LUSK: No; when you take a polygraph,
10 you're alone with the examiner.

11 MR. BICKLEY: I mean, were they in there
12 before he hooked him up? He wasn't crying and
13 wired up when they asked him these questions in the
14 questioning; is that what you're saying?

15 MS. LUSK: No, it was prior to the
16 questioning.

17 We want to get into his physical
18 condition. We don't want to touch the polygraph.

19 MR. BICKLEY: I can understand that.

20 MS. LUSK: And we didn't want to touch it
21 the last time, either, but it just mushroomed.

22 THE COURT: It sounds to me like it's a
23 legitimate line of inquiry, but the results of a
24 polygraph are not.

1 MR. REVERCOMB: According to what Tim has
2 just said, they should be able to ask, to get into
3 the reason he cried, that it wasn't possibly
4 because he was going to take a polygraph test.

5 MR. HUFFMAN: There's a difference in
6 asking him and --

7 MS. LUSK: I don't believe -- there is no
8 inquiry in the first trial as to what the results
9 of the polygraph were. It was purely implication,
10 like, after you finished your polygraph you went to
11 jail? And, after you finished polygraph number
12 two, you got out of jail?

13 I mean, it didn't take a genius -- and ~~HE~~

14 COURT: I understand.

15 MS. LUSK: And they tried to draw a
16 distinction between admission of evidence that a
17 polygraph was administered, and admission of
18 evidence that a polygraph -- what the polygraph
19 results were.

20 MR. BICKLEY: He used it in closing
21 arguments.

22 MR. REVERCOMB: Yeah, I think he did.

23 MR. BICKLEY: And he shouldn't have.

24 MR. REVERCOMB: I agree.

1 MS. LUSK: True. It shouldn't have come
2 in at all.

3 THE COURT: Well, I don't think a
4 polygraph is like insurance, Okay? Or, at best,
5 it's like putting on evidence of insurance and it's
6 going to invite error, or something like that if it
7 comes in, but we all ought to start with the notion
8 that everybody wants to keep it out.

9 Their problem is, if they get whipsawed --
10 because in all of this there is a grain of evidence
11 for the defense, and that is possibly he was there
12 to take the polygraph and after he took the
13 polygraph, he went to jail. I frankly don't think
14 that that's -- the inference is that the polygraph
15 is a reliable -- and then he made a factual
16 inculpatory statement. The Supreme Court says they
17 are not reliable.

18 MS. LUSK: Of course, he made factual --
19 after he took the polygraph, he confessed. I mean,
20 they have hours of factually inculpatory statements
21 against him at that point.

22 MR. REVERCOMB: And what really concerns
23 me is that after it was all said and done, after
24 this whole polygraph thing mushroomed at the trial,

1 Mr. McKittrick is the one who mentioned it first,
2 and of course, the Supreme Court did not buy our
3 argument.

4 It was our argument that it was invited
5 error, that he's the one that got into it.

6 THE COURT: Yeah, I understand that. I
7 understand that, and I won't let anything in on it.
8 That's one of the easily understood lessons to the
9 Defendant. But I think you can put on evidence of
10 Reggett's physical condition.

11 Okay. What else have you got? Do you
12 have anything else for the State?

13 MS. LUSK: No. I just had a note here to
14 ask Nelson what he worked out about his other
15 trial.

16 MR. BICKLEY: Huh?

17 MS. LUSK: What did you work out about
18 your other trial?

19 MR. BICKLEY: Well, I meant to bring it
20 down here, your Honor. I need to discuss it with
21 you.

22 I sent Judge Hallanan, oh, I guess a week
23 or so ago or longer, the fact that I had this trial
24 starting, and I asked for her to continue the one

1 of the 19th, which she granted, and the one on the
2 26th which she has denied. I had to go up there to
3 Beckley on Tuesday to argue motions for the one on
4 the 19th and that's when the government got up and
5 said, "Your Honor, I understand what Mr. Bickley's
6 problem is. I am familiar with the Moss trial, and
7 it will at least probably go two weeks, and maybe
8 three weeks."

9 I got up and said that "Judge MacQueen has
10 assured me that he is going to try to keep it
11 within two weeks, but again, if it doesn't
12 encompass three week, two weeks would still
13 encompass the 26th."

14 She says from the bench, "I am familiar
15 with the Moss trial, but this is not why we are
16 here today."

17 Now, this is a drug trial, which has been
18 scheduled to start on the 26th and she has denied
19 to continue it. I think that once the trial goes
20 past a week and she sees that it doesn't fold and
21 I go up and ask for a reconsideration, that she
22 will reconsider. At least, she indicated -- the
23 government agreed whole-heartedly that I should
24 have a continuance; that's the Federal government.

1 And Judge Hallanan indicated to me that she
2 understands my problem, but that that wasn't -- "We
3 are here on this case, the Davis case," and she has
4 given me that continuance, and apparently, the
5 Pannell case, she didn't want to at that time.

6 THE COURT: What I'll do is, when we get
7 to about Thursday of next week, I'll take time out
8 and call her.

9 MR. BICKLEY: Okay.

10 THE COURT: I'm sure -- you know, I've
11 never had any problem getting one of the Federal
12 Judges to say that they'll accommodate us if we've
13 got one going here. I'm confident that she will.

14 MR. BICKLEY: Okay. Are you through?

15 MS. LUSK: Yes.

16 MR. BICKLEY: Now, there are some of the
17 things, I am still certain that the government is
18 aware of, but I think it is incumbent upon me to
19 assure them. I have a motion in limine on all of
20 his prior convictions, not only the -- understand,
21 we're not talking about -- we're going to try to
22 work this out as far as possible, but --

23 THE COURT: Let me ask you to do me a
24 favor with your witnesses. As you are woodshedding

1 them, would you just tell them that it's extremely
2 important that they don't blurt out something that
3 relates to the prior trial in this case. We're
4 going to get into the situation where it may be --
5 any number of witnesses may be impeached by their
6 prior trial testimony.

7 What I would suggest is that you just --
8 with those witnesses that the prefatory questions
9 be asked, like, Now, Mr. Jones, on this case, you
10 have previously testified; have you not?

11 Yes, I have.

12 And did you not testify at that particular
13 case --

14 And that way, it's ambiguous enough so
15 that it doesn't directly lead the jury to the
16 conclusion that there was one.

17 MR. LUSK: And so, Judge, if we could, we
18 might need to get into dates of the witnesses'
19 testimony that they are making reference to, just
20 so counsel can follow. Because some of these
21 witnesses, the Police Officers, in particular, some
22 of them testified at Reggett's preliminary hearing,
23 Reggett's suppression hearing --

24 THE COURT: Well, what you need to do is

1 go to the transcript and just point out the page
2 number where it shows up --

3 MR. REVERCOMB: And be sure not to call
4 the trial transcript the "trial transcript."

5 THE COURT: Right. These jurors have been
6 -- you know, we've got a panel that's been here
7 about eight weeks. They are going to have had
8 deposition transcripts and that sort of stuff read
9 to them before. They don't have any reason to
10 understand that this is from a prior trial.

11 MR. BICKLEY: Well, we have the Smiths.
12 We have to make certain that they come in from
13 Manville, Ohio, not the reform school.

14 MS. LUSK: Uh-huh.

15 MR. REVERCOMB: It wasn't a reform school.

16 MS. LUSK: It was the Ohio State Reform
17 School.

18 MR. BICKLEY: Well, just say that they are
19 coming from Manville, Ohio, rather than --

20 THE COURT: Right; right.

21 MS. LUSK: They know that.

22 MR. BICKLEY: And we have a motion in
23 limine that their --

24 THE COURT: What are you going to do if an

1 inmate is from the penitentiary? We need to
2 address that before you put him on. We're going to
3 have to do that anyway.

4 MR. REVERCOMB: Yeah, we do. Of course,
5 we have inmates from the Kanawha County Jail, but
6 that's never been a problem. I don't know how you
7 want to handle that, but --

8 THE COURT: Well, let's -- before you call
9 them, ask me for a recess and I'll get into the
10 details about what they're going to testify and
11 we'll see if we can't not recreate, but sterilize
12 their testimony a little.

13 MS. LUSK: Well, we might want to lead
14 them a little bit.

15 THE COURT: Oh, yeah. Right, right.

16 MS. LUSK: I don't think any of them will
17 be that long. They won't be lengthy witnesses.

18 THE COURT: Okay.

19 MR. BICKLEY: There is some witness who
20 wanted, prior to Mrs. Reggett's death, that there
21 was some confrontation on the railroad tracks with
22 a black man. There is going to be no association
23 with a black man, vis-a-vis John Moss. We don't
24 think that testimony -- we believe that testimony

1 to be prejudicial and not to have any impetus for
2 them.

3 THE COURT: Who offered, or who gave that
4 testimony?

5 MS. LUSK: It wasn't offered. We agreed
6 not to offer it the last time.

7 THE COURT: And you're not going to put it
8 in this time?

9 MS. LUSK: No.

10 THE COURT: All right.

11 MS. LUSK: We can't connect it up. Nobody
12 can identify and say it was him.

13 THE COURT: Okay. Let me ask you this,
14 what do you have this afternoon?

15 MR. BICKLEY: I don't have anything.

16 THE COURT: Can you come back this
17 afternoon at 2:00 o'clock?

18 MR. BICKLEY: Yes, I can.

19 THE COURT: Okay. We'll pick up where we
20 left off then. Don't forget to renew this motion
21 on Sopher, too.

22 MR. BICKLEY: Okay.

23

24 WHEREUPON, the Court stood in the noon

1 recess.

2 (Back on the Record)

3

4 THE COURT: Okay, are you all ready?

5 MR. BICKLEY: Okay. We want to bring up
6 Dr. Sopher.

7 THE COURT: Yeah. Let me just -- you've
8 got -- Sopher is going to testify as to the cause
9 of death and time of death; right? And you've got
10 no objection to that?

11 MR. BICKLEY: None at all.

12 THE COURT: What else -- okay, he's going
13 to testify to some facts --

14 MS. LUSK: Uh-huh.

15 THE COURT: -- and make some observations
16 about the physical surroundings. How long after
17 the bodies were discovered did Sopher get there?

18 MS. LUSK: An hour.

19 THE COURT: How many officers are on the
20 spot at any given time?

21 MS. LUSK: Well, there were several there,
22 Judge, and I can't say off the top of my head how
23 many of them were inside, and how many of them
24 never went inside. There were a number that were

1 outside conducting searches in the immediate area,
2 and so forth and so on.

3 On the premises, though, there was the
4 fingerprint expert, the serology expert, the
5 medical examiner, Roark --

6 THE COURT: Is the serologist somebody --
7 is he a State cop?

8 MS. LUSK: Zain.

9 MR. REVERCOMB: He's no longer a cop.

10 MS. LUSK: Former.

11 MR. REVERCOMB: The fingerprint expert had
12 some help. He may have had one or two people
13 helping him.

14 MS. LUSK: Well, the medical examiner did
15 too, that I know of.

16 MR. REVERCOMB: There was a lot of people
17 there.

18 THE COURT: I see. So, you're talking
19 about what -- maybe ten, twelve people inside?

20 MS. LUSK: Probably.

21 THE COURT: Okay.

22 MS. LUSK: Well, I don't think they were
23 all inside, though, until after the experts had
24 finished what they were doing. I mean, the

1 photographer came in and took all of the pictures
2 first, and then the fingerprints and the serology,
3 and the medical examiner did their business, and
4 then the troops came in, I think, and started
5 gathering up and taking out of there.

6 THE COURT: Okay. Now, in addition to the
7 facts, what else are you going to have him testify
8 to? What other opinions will be offered, assuming
9 that he is not given the opportunity in cross-
10 examination to volunteer a lot of stuff?

11 MS. LUSK: Well, Judge, he had a lot of
12 observations there at the scene, and his opinion
13 about the hanging and the length of time hanging,
14 and I mean, his opinions relate to the condition of
15 the bodies.

16 MR. REVERCOMB: Time of death -- he'll
17 explain how long strangulation takes, and things
18 like that.

19 THE COURT: That's cause of death. One of
20 those things you were talking about this morning --
21 is he going to testify that, for example, if they
22 found blood in a certain location that that meant
23 that the cut was a right to left cut, or something
24 like that? Is he going to testify about other

1 matters, and stuff?

2 MS. LUSK: No, not really. I mean, I
3 think what Nelson is talking about was he had an
4 opinion that Vanessa must have been picked up and
5 moved from one location where she bled a great
6 deal, to another location where she bled a great
7 deal. He didn't observe anything which indicated
8 that she was upright for any length of time,
9 because there were no droplets of blood on the
10 shoulders of her nightgown.

11 THE COURT: Okay.

12 MR. REVERCOMB: And of course, Dr. Sopher
13 is an accident reconstructionist with cars. I've
14 had him in a DUI causing a death case where he --
15 blood splatters were important.

16 THE COURT: Okay. I'm just trying to find
17 out, though, what we're talking about so I can
18 identify what they've got an objection to; that's
19 all. Whether he's got qualifications to make
20 certain observations, I'm not sure that I could
21 rule on today. I mean, I've heard him in other
22 cases, but obviously the cause of death --

23 MS. LUSK: There's a pattern of injury on
24 Vanessa, and he took the piece of a gun butt that

1 was broken off and remained in the house, and
2 actually compared it with the wound on her head --

3 MR. BICKLEY: Wait, let me tell you what
4 upsets me. He identified blood on the Christmas
5 wrapping as foreign blood. Now, that's not -- he's
6 not a serologist --

7 MR. REVERCOMB: We're going to use a
8 serologist to do that.

9 MR. BICKLEY: But, I mean, that's what he
10 did.

11 THE COURT: So, you're not going to use
12 him for that?

13 MR. REVERCOMB: No, no.

14 MS. LUSK: Well, I didn't even realize --
15 I must have skipped right over that.

16 MR. BICKLEY: I think Parrish may have
17 walked into this, but --

18 MR. REVERCOMB: Well, as a matter of fact,
19 he does know that it was foreign, but he couldn't
20 have --

21 MR. BICKLEY: No, because he said that it
22 is unlikely that Mrs. Reggett would --

23 MS. LUSK: -- would have opened the
24 presents and left the lid on them; that's kind of

1 common sense.

2 MR. BICKLEY: Yeah, but I don't need him
3 to make that observation.

4 MS. LUSK: Is there any other observation
5 other than that which you are particularly upset
6 about?

7 MR. BICKLEY: Well, that was the main
8 concern. But the other observations that I found
9 distasteful was the jousting back and forth,
10 intellectualizing, which had nothing to do -- they
11 were educating --

12 THE COURT: But you're not going to give
13 him that opportunity; are you?

14 MR. BICKLEY: No, I'm definitely not.

15 MS. LUSK: So, the foreign blood is the
16 only thing that you are particularly offended by?

17 MR. BICKLEY: The foreign blood and --

18 THE COURT: If you've got a serologist,
19 tell him not to talk about that. He's just
20 buttressing, and that's not appropriate.

21 MS. LUSK: All right. I'll tell him not
22 to characterize it as foreign blood.

23 Is there anything else that would make you
24 happy?

1 MR. BICKLEY: If he would just give us the
2 time of death and how they died, and I'll have no
3 questions.

4 THE COURT: Well, some of this stuff is
5 kind of permutations on that, like the length of
6 time of the hanging. That's something he can
7 obviously talk about.

8 MR. BICKLEY: Yeah. I don't see anything
9 wrong with that. We're not trying to deny that
10 somebody killed these people.

11 MS. LUSK: But his testimony will be
12 pretty long, will be pretty lengthy. This is about
13 the most -- he told me the other day this is about
14 the most involved case he'd had since he's been the
15 medical examiner.

16 MR. BICKLEY: And he'll say that. He does
17 not need to make that characterization.

18 THE COURT: You know what somebody's going
19 to do one of these days? Somebody's going to come
20 back and pay the money to go through the routine
21 files downstairs and get transcripts of his
22 testimony, and say, I'll guarantee you that he's
23 said that before.

24 MR. BICKLEY: And he doesn't need to say

1 that.

2 MS. LUSK: Well, I'm not going to ask him
3 that, Nelson. That was just an observation he
4 made.

5 MR. BICKLEY: Neva, he's absolutely
6 uncontrollable. He's going to say that this is the
7 most involved, complicated -- and you know what
8 this does, really it directs all of the attention
9 over on your client. He is uncontrollable unless
10 you really put the harness on him.

11 THE COURT: If he starts rambling out of
12 hand, I'll take a recess and I'll suggest to him
13 myself that he ought to refrain from volunteering
14 a lot of that.

15 As I've told you, I have immense respect
16 for Sopher's skills and abilities, but he tends
17 from time to time to be a team player.

18 MR. BICKLEY: He does, your Honor.

19 THE COURT: And he ordinarily gets away
20 with it. I mean, he's very good. I've seen him
21 tear up more lawyers than you can shake a stick at.

22 MR. BICKLEY: It's the kiss of death to go
23 up there and challenge him.

24 THE COURT: You can nail him if you get

1 something that he doesn't know about, some really
2 curious, esoteric issue. But other than that --
3 okay, what else?

4 MR. BICKLEY: Well, I think this is a
5 positive thing -- the site visit.

6 MS. LUSK: The what?

7 MR. BICKLEY: The jury view.

8 MS. LUSK: We probably do want to take a
9 view.

10 THE COURT: Do you care one way or the
11 other?

12 MR. BICKLEY: We don't want it.

13 THE COURT: Okay.

14 MS. LUSK: The house is changed
15 dramatically. I mean, there'll have to be some
16 characterization --

17 THE COURT: Are there people living in it?

18 MS. LUSK: There are people living in it,
19 and the man -- the husband just had a leg
20 amputated. But they are expecting him to be back
21 in the hospital undergoing some therapy, so he
22 won't be there, hopefully, when we go.

23 THE COURT: Okay. What I'd like to do in
24 a view, is to just completely eliminate any talk

1 other than to give the jury instructions about
2 where to go, "To walk around here; look all around
3 you", that sort of thing.

4 MR. REVERCOMB: Just viewpoint things.

5 THE COURT: And I'll do that in each
6 instance only by agreement of counsel.

7 The problem is that you don't have the
8 ability to transcribe or record the comings and
9 goings of everybody, to recreate that for the
10 record. So, I would like to have the evidence in
11 front of the jury about what they are going to want
12 to see before they go see it.

13 So, what I would suggest that you do is to
14 keep -- are you going to make arrangements with a
15 bus company to do it?

16 MS. LUSK: I guess we need to decide when
17 and then I think Bob Slack is usually pretty good
18 about making those arrangements.

19 THE COURT: Fine. I would suggest, too,
20 that you confer with Defense lawyers during the
21 course of the trial when you think you're getting
22 close to that. And if you've got any objections,
23 let's take that up, but let's sort of keep posted
24 on that view during the course of trial.

1 What I will do, also, is I'll tell the
2 jury at the beginning, and if I don't do it
3 somebody needs to remind me of that, but we'll do
4 that before opening statements; tell them to pay
5 close attention to the photographs and drawings and
6 designs that we've got that show the physical
7 environment of where this occurrence was, because
8 we're going to go see it, and we won't offer any
9 testimony at the site about what is what.

10 What are you going to ask the jury; or
11 what do you want me to ask them?

12 MR. BICKLEY: I'm going to give you some
13 questions on the matter of race and whether or not
14 they think they would have any problems -- do they
15 have any problems with blacks; the basic questions.
16 And also, so you have any parents or relatives who
17 have been the victim of crime by blacks?

18 THE COURT: Incidentally, what I'm going
19 to do, and I would like for both of you to give me
20 your prospective list and give it to me first thing
21 Monday morning, but I'm going to have something
22 generally. I will not ask the race question
23 generally, because I think you can get the best
24 answers specifically. Also, publicity; I'm going

1 to put together some publicity stuff to ask.

2 Now, do you want me to ask the questions
3 or do you want to ask them?

4 MR. BICKLEY: I don't care whether you ask
5 them or not.

6 THE COURT: What I propose is that I will
7 ask both sides' questions and then let you follow
8 up if there is some response to particular ones.
9 I'd like to try to keep that to three or four
10 minutes per juror.

11 MR. BICKLEY: Well, perhaps there are one
12 or two questions that I would like to ask the jury
13 myself because I can identify with the issue of
14 being black.

15 THE COURT: And it won't be argument.

16 MR. BICKLEY: No, it won't be argument.
17 And it would just be very brief.

18 THE COURT: Okay.

19 MS. LUSK: I'd like to ask that no mercy
20 question, myself.

21 THE COURT: Okay; that's fine.

22 Bring the ones that you want me to ask in
23 writing, and well, just bring in all of your
24 questions and identify which is which, and before

1 we go into them, I'll sit down and spend ten
2 minutes with them and tell you what I'm going to
3 ask them. But I'll get into all of that stuff
4 about are any of you related to Police Officers,
5 are any of you victims of crime, and sort of stuff.
6 I just want to see your lists.

7 MR. BICKLEY: All right.

8 MR. REVERCOMB: Will we ask the questions
9 in a group first and then we'll go back
10 individually?

11 THE COURT: Yeah, right. I'm going to do
12 all of the nuts and bolts stuff out here, just to
13 avoid the necessity of repeating it.

14 MR. BICKLEY: Where is the jury list? Did
15 we get one?

16 THE COURT: You can get one downstairs.
17 It's the same panel -- they are summoning in
18 thirty, no, fifty jurors. We have two trials to
19 go, a civil and this one. What I'm going to do is
20 to roll out the first thirty, and from that we'll
21 put twenty-four jurors, which will give us two
22 alternates -- have you all looked at the Rules of
23 Criminal Procedure? I think it's one and one
24 strike; isn't it?

1 MR. REVERCOMB: Yeah.

2 THE COURT: Let me look here -- it says,
3 you pull twenty-four names, and with that twenty-
4 four do the questioning, and when you've got
5 twenty-four jurors free of exception, you'll take
6 your six out of the first twenty, you take your two
7 out of the first twenty, and then -- I'm sorry --
8 you take your first two, you take your six, then
9 you take one and out of the remaining four, you
10 take one. That leaves us with fourteen in the box.

11 Okay?

12 MR. BICKLEY: Okay.

13 THE COURT: I don't think you're going to
14 need more alternates than that.

15 What else have you got?

16 MR. HUFFMAN: What about the confessions?

17 THE COURT: Yeah, as I've indicated, I'm
18 going to allow those in. If you -- the two
19 confessions. I'm going to articulate some detailed
20 basis for that. I'll do that when we get started.
21 And your objections can be saved for the record.

22 MR. REVERCOMB: Your Honor, one last
23 thing. About the statement of Carlton Moss. I
24 have a list of cases for that that I've got the

1 cites on. I'm going to give you a set of cases,
2 first of all, I think the right to confrontation,
3 I think there is -- the distinction ought to be
4 noted that this is his brother. If anyone knows
5 where he is, he does. He's unavailable because we
6 can't find him. We're trying to find him, and I
7 hope we're able to find him, to secure his presence
8 here.

9 But these cases talk about --

10 THE COURT: But he doesn't have to help
11 you find him.

12 MR. REVERCOMB: No, no, I'm not saying
13 that. But I do think that the distinction -- well,
14 these cases generally say -- they talk about the
15 confrontation clause and hearsay. They are really
16 designed to protect the same thing. And they about
17 it at great length.

18 The right to confrontation, they say where
19 we show that he is unavailable, if we show that the
20 statement is reliable and that there is sufficient
21 indicia of reliability and trustworthiness, then it
22 can be admitted over the right to confrontation
23 claims. I'll just hand you these cases. They are
24 West Virginia and United States Supreme Court

1 cases.

2 Because on the other hand, 804(b), the
3 statements that would come under that exception
4 would always -- were that if the declarant is
5 unavailable, would always violate his right to
6 confrontation at trial proceedings.

7 THE COURT: But there is no such right in
8 a civil case?

9 MR. REVERCOMB: Right.

10 THE COURT: So 804 is tailored to deal
11 with both?

12 MR. REVERCOMB: Right. These cases cite
13 the current law.

14 THE COURT: Did you all find anything
15 contradictory to this?

16 MR. HUFFMAN: No, your Honor.

17 THE COURT: You're not going to call this
18 guy -- you wouldn't propose to put that on in the
19 first couple of days; would you?

20 MR. REVERCOMB: No.

21 THE COURT: One of the things -- I'll
22 spend a couple of minutes with security, but one of
23 the things I do want to make sure of is that the
24 jury is excused before Mr. Moss is brought in or

1 taken away from the Courtroom.

2 Do you have any arrangements made for
3 street clothes?

4 MR. HUFFMAN: Yes, your Honor.

5 MS. LUSK: Probably, before we take the
6 view, too, Judge, we'll have to make a record of
7 what kind of security we want to impose at the
8 view. We don't want that to be an open arena. And
9 I guess if the Sheriff wants to handcuff him or
10 shackle him, then it would be in the presence of
11 the jury, and we need something on the record on
12 that.

13 THE COURT: Yeah, and I expect we'll --
14 I'll sit down with them. My inclination is to give
15 the Sheriff's office a lot of discretion in the
16 security issues, to the extent that that can be
17 done consistent with the Defendant's rights to as
18 fair as possible a trial.

19 MR. BICKLEY: I would like it noted that
20 he did not find any gunshot residue on Mrs.
21 Reggett, and I'm just telling you that this is
22 something that will go on during the course of the
23 trial.

24 THE COURT: Okay.

1 MS. LUSK: You wanted to raise the speedy
2 trial issue.

3 MR. BICKLEY: Right. We want to raise
4 the speedy trial issue.

5 THE COURT: Okay, go right ahead.

6 MR. BICKLEY: Well, John never agreed to
7 a continuance. We came up, I believe, and moved
8 for a continuance and the State moved for a
9 continuance --

10 THE COURT: Now, are you talking about
11 from the time of arrest to now, or from the time of
12 reversal to now?

13 MR. BICKLEY: From the time of reversal.

14 THE COURT: Okay. When was the reversal
15 effective?

16 MS. LUSK: It was reversed in December,
17 but an Order of Remand wasn't received until
18 February.

19 THE COURT: Of this year?

20 MS. LUSK: Of '89.

21 THE COURT: February of '89?

22 MR. BICKLEY: And he came here in '88.

23 MS. LUSK: No, he came in '89.

24 MR. BICKLEY: Then, it was reversed in

1 '88.

2 MS. LUSK: We brought him down before the
3 Order of Remand was even received. Probably, we
4 should have waited until the Order of Remand was
5 received, but I went ahead and did a Transportation
6 Order --

7 THE COURT: And it was received in
8 January?

9 MS. LUSK: I was thinking it was February.

10 THE COURT: Oh, February, okay, of '89?

11 MR. REVERCOMB: January of '89 Term.

12 THE COURT: Okay, so we're in -- we're
13 three terms later?

14 MS. LUSK: Right. The State has moved for
15 one continuance.

16 MR. REVERCOMB: And that was in December
17 of '89.

18 MS. LUSK: To do the DNA testing.

19 MR. REVERCOMB: That would have been the
20 September '89 Term.

21 THE COURT: Okay. How did the case get
22 continued from the January to May terms?

23 MS. LUSK: Defense motion.

24 MR. REVERCOMB: And from May to September

1 was Defense motion.

2 THE COURT: Is that correct?

3 MR. BICKLEY: Yes, sir.

4 THE COURT: Then what is your argument
5 that since you only asked for two of those that --

6 MR. BICKLEY: No, we only asked for one.

7 THE COURT: They said two.

8 MR. BICKLEY: Right, there were two
9 continuances, one by --

10 MS. LUSK: Three altogether; two by the
11 Defense and one by the State.

12 MR. BICKLEY: When was the third one? I
13 don't recall that one.

14 MS. LUSK: From --

15 MR. REVERCOMB: Well, you have the January
16 to May term, and you have the May to September
17 term; that's two.

18 MR. BICKLEY: The May term --

19 THE COURT: The third one they asked for
20 that brings us up to this time?

21 MR. REVERCOMB: Your Honor, I think the
22 record will show that they didn't object to it. We
23 kind of hemmed and hawed on the record, but you
24 were going to ask for a continuance and then you

1 decided not to.

2 MS. LUSK: And you filed a written motion
3 for continuance, and when we got up there for the
4 hearing and you said your client objected, you
5 withdrew the motion, and then we moved for a
6 continuance because we needed to have the DNA
7 testing. And he did not object.

8 THE COURT: Do we have transcripts of any
9 of those motions?

10 The file has in the main text everything
11 up until the Remand Order, and then it's got mixed
12 things in it. And there are no Orders reflecting
13 that there was a continuances in this. Well, there
14 are hearings on motions, the question of counsel,
15 and that sort of thing. So, I'm going to have to
16 go through it.

17 Let's do this: let's take this up when
18 I've had a chance to go through this and pull out
19 the documents.

20 But you think you've got a continuance in
21 there?

22 MR. BICKLEY: I know we have one
23 continuance in May, I believe. And we did not want
24 a continuance in the one, and the Defense contests.

1 I don't recall the third one, I may have, but I
2 don't recall the third one.

3 THE COURT: There ought to be three:
4 There ought to be from January to May term, from
5 May to September term, and then from that term to
6 here.

7 MR. BICKLEY: They got the last
8 continuance, I think.

9 THE COURT: Well, let me go through the
10 file and find out. What else? Is there anything
11 else?

12 MR. REVERCOMB: The last continuance was
13 because we didn't have the report yet. They
14 requested it, while it was within the term. Didn't
15 we have a January trial date or a February trial
16 date?

17 MS. LUSK: February 5th. We were moved
18 from February 5th --

19 THE COURT: Yeah, I did that one. I did
20 that. But that's not from term to term.

21 MR. REVERCOMB: No.

22 THE COURT: Well, I'll check on that.

23 If there's nothing else, then ...

24 WHEREUPON, the proceedings were concluded.

1 STATE OF WEST VIRGINIA

2 COUNTY OF KANAWHA, to-wit:

3

4 I, Connie L. Cooke, Official Reporter for
5 the Circuit Court of Kanawha County, do hereby
6 certify that the foregoing is a true and correct
7 transcript of the proceedings had and reported in
8 the above captioned matter, had on the 13th day of
9 April, 1990, during the January 1990 Term of said
10 Court, as reported by me and transcribed into the
11 English language.

12 Given under my hand this 3rd day of
13 February, 1993. ,

14

15

16

Connie L. Cooke

17

Official Reporter

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19

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24

MOSS v. BALLARD
CASE NO. 2:09cv01406

RESPONDENT'S EXHIBIT 32

1 IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2
3
4 STATE OF WEST VIRGINIA

5
6 vs.

7
8 JOHN MOSS, JR.

9
10
11 BEFORE: Hon. A. Andrew MacQueen, Judge

12
13
14 APPEARANCES

15
16
17 For the State: Neva Lusk and Stephen Revercomb,
18 Assistant Prosecuting Attorneys for Kanawha County.

19
20 For the Defendant: The defendant, in person, and
21 by Nelson Bickley, Timothy Huffman, and Kathy Beckett,
22 his counsel.

23
24 Connie L. Cooke
25 Official Reporter

FILED
90 APR 17 PM 1:53
CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

25

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1 BE IT REMEMBERED, that on Monday, the 16th day of
2 April, 1990, during the January 1990 Term of said Court,
3 in the matter of the State of West Virginia versus John
4 Moss, Jr., as aforesaid, a suppression hearing was
5 previously held on the 13th day of April, 1990, and the
6 following ruling of the Judge was entered on the first
7 day of trial:

8
9 THE COURT: Let's put my ruling on the record
10 right now.

11 Previously, I have told the attorneys in this
12 case my ruling on the question of suppression of the two
13 statements about which I heard argument a couple of weeks
14 ago. I have ruled that those statements are admissible,
15 and there are two reasons why that -- why I want to
16 articulate the two bases for that ruling.

17 First is, having read the decision on Appeal of
18 this case, I am satisfied that the Supreme Court of
19 Appeals, in that case, held those two statements
20 admissible. And I believe that they specifically
21 considered, while not on its face very completely, the
22 question of the immediate taking of the defendant before
23 a Magistrate or Referee, because the Court said that.
24 So, I believe that the admissibility of those statements

1 is law of the case by the Supreme Court of Appeals.

2 If that were not the case, I would nonetheless
3 authorize the admission of these two statements because
4 I believe that the foray or diversion from the direct
5 route from Ohio to Charleston, West Virginia, the taking
6 of the statement does not violate either specific
7 language or the principles embodied in the juvenile
8 statute requiring an immediate presentment. And for the
9 life of me, I can't remember the name of the other case.

10 MR. REVERCOMB: Elsworth.

11 THE COURT: Elsworth. It is particularly noted
12 in Elsworth that the defendant in that case, while that
13 statement was held admissible, the defendant or
14 respondent was not taken immediately, but in fact was
15 taken to a Police Station later to give a statement.

16 Law Enforcement Officers are entitled to, so long
17 as they follow the rules, take statements. It's an
18 efficient and effective way to solve a crime, although
19 this case raises some question with respect to the
20 infallibility of that taking. But, it's a legitimate
21 technique to take a statement, so long as those
22 statements are verified and are taken under
23 constitutionally permissible conditions. The officers
24 in this case -- we're not talking specifically about this

1 case, but we're talking about this by implication --
2 there was another criminal offense, and it was suggested
3 then that they wanted to talk to him about something else
4 and he said he was willing to talk to them. And they
5 made the circumstances comfortable for him. I don't find
6 that a violation of the statute, and I will admit the
7 statements.

8 MR. BICKLEY: Will you note our exceptions, your
9 Honor.

10 THE COURT: They are taken.

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

I, Connie L. Cooke, Official Reporter for the Circuit Court of Kanawha County, do hereby certify that the foregoing is a true and correct transcript of the proceedings had and reported in the matter of the STATE OF WEST VIRGINIA versus JOHN MOSS, JR., upon action number as stated in the caption hereto, had on the 16th day of April, 1990, during the April Term of said Court, as reported by me and transcribed into the English language.

I hereby certify that the transcript within meets the requirements of the Code of the State of West Virginia, 51-7-4, and all rules pertaining thereto as promulgated by the Supreme Court of Appeals.

Given under my hand this 16th day of April, 1990.

Connie L. Cooke

Official Reporter

IN THE CIRCUIT COURT OF KANAWHA COUNTY

WEST VIRGINIA

01 AUG 31 PM 3:52



STATE OF WEST VIRGINIA

CATHY S. WATSON, CLERK
KANAWHA COUNTY / DISTRICT COURT

Action No. 94-MISC-663

vs.

JOHN MOSS, III

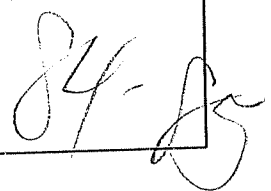
BEFORE: Hon. A. Andrew MacQueen

Reconsideration of Legal Conclusions

December 1, 2000

Connie L. Cooke

Official Reporter



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APPEARANCES

FOR THE STATE:

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FOR THE DEFENDANT:

The Defendant, in person

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1 BE IT REMEMBERED, that on Friday, the 1st day
2 of December, 2000, during the September 2000 Term of
3 said Court, in the matter of the STATE OF WEST VIRGINIA
4 versus JOHN MOSS, III, upon Action No. 94-MISC-663, as
5 stated in the caption hereto, the following transpired:

6
7 THE COURT: Alright; go ahead.

8 MR. SIMMONS: I think the last time I was in
9 here you did issue a ruling from the bench where you
10 addressed the second prong of the laboratory decision,
11 and you concluded, based on the record, that Mr. Moss
12 was not prejudiced by Fred Zain's testimony. And when
13 I went back and looked at looked at the motion I filed,
14 it just occurred to me, Judge, that the Court will
15 benefit from a development on the record from you as
16 to, number one, your rationale for that legal
17 conclusion. And then, when I went back to the motion,
18 I did point out various factual things, either that I
19 thought were maybe not exactly correct, and then some
20 things that I thought were omitted. And I thought just
21 for purposes of the record, it would be helpful to have
22 those addressed.

23 I do think, after I reread my
24 motion, Judge, I do recall that you did state on the

1 record, besides that one conclusion, that you realized
2 that that one footnote was wrong, that there hadn't
3 been any DNA testing to consider, or anything. And
4 just to keep the record clear, I wanted to make sure
5 the record was clear on that.

6 THE COURT: Right.

7 MR. SIMMONS: But to me, the most
8 significant thing that I think I need for the record to
9 reflect is your, I guess your legal explanation as to
10 why you concluded that Moss was not prejudiced by Fred
11 Zain's testimony in this case. And I just -- if you
12 have any way of -- and I think what I was trying to do
13 in my motion, I went back to the laboratory decision
14 and took an advocate position to see what they were
15 talking about, and it seemed to me that the cases that
16 the Supreme Court relied upon in coming up with that
17 two-part test of the laboratory decision, on the second
18 part of the test they were really focusing on
19 eliminating cases where the prejudicial Zain testimony,
20 false testimony, whatever you want to label it, wasn't
21 a significant part of the case, or it wasn't simply a
22 tangential part, and I added that word "tangential".
23 And I think from my reading of the trial transcript
24 that that would not be a fair conclusion to make. I

1 don't think it would be fair to say that Fred Zain was
2 a tangential part.

3 So, I guess the way I could see
4 this case being resolved, Judge, your initial ruling,
5 of course, is that the laboratory standard doesn't
6 apply. Of course, we disagree with that and we object
7 to that. But that was your ruling.

8 Then what you did, you kind of went
9 above and beyond the call of duty. You said, Okay, if
10 I did apply the standard, on step one, I'm going to
11 look at it to see what was the evidence to support
12 conviction without Fred Zain stuff. And you looked at
13 his confession, and a couple of other things, the
14 camera, the silverware, and you said, Well, that would
15 have been sufficient for a conviction, and you stopped
16 in your Order there.

17 Whereas, the laboratory decision,
18 as a second step, and says, Well, if you conclude that
19 other evidence is sufficient to support a conviction,
20 you then have to analyze, Well, was this person
21 prejudiced by this tainted testimony that is a
22 violation of due process, and that is what I'm here
23 trying to get laid out on the record today.

24 Now, what I can see happening,

1 Judge, is you've already made your ruling. You've
2 already held that the laboratory decision doesn't
3 apply, so you've already made your decision on step
4 one.

5 I can see you concluding, under
6 step two, that he was, in fact, prejudiced by Zain's
7 testimony because it was a big part of the case. At
8 least in my view, that was the critical evidence that
9 allowed the jury to distinguish the confession given by
10 Reggett and the confession given by Moss. I mean,
11 obviously, this is an extremely unusual case.

12 The jury had to choose between
13 conflicting confessions between two separate people.
14 And from our viewpoint, the critical evidence that
15 allowed them to do that was Fred Zain's testing and
16 testimony. Therefore, I can see the Court finding, as
17 it has already, but then concluding that he was
18 prejudiced by Fred Zain's testimony, and then I could
19 take it up on appeal. It wouldn't change your result,
20 because what you are actually doing here, Judge, I
21 think, is giving the State Supreme Court the benefit of
22 your analogy, because you've already told the Supreme
23 Court that in your view the laboratory decision doesn't
24 apply. But if it doesn't apply in step one, the other

1 evidence is sufficient.

2 But then you said, Well, if step
3 two doesn't apply, then he wasn't prejudiced by it,
4 because it was not a tangential part of the case; it
5 was a very significant part. Then, I would have a nice
6 complete Order to take up to the Supreme Court just on
7 this issue, and they may agree with you on your initial
8 analysis, and at the end of it, if they believe that
9 the laboratory decision applied, then they would have
10 the benefit of your analogy that you would have applied
11 to this case. So, that is the legal part. That is the
12 most important thing I need to get brought in.

13 I think the factual things are --
14 maybe I emphasize facts differently than the way you
15 do. I guess I would just ask the Court to review that
16 motion again on those factual statements, and you may
17 determine that you don't feel it necessary to say
18 anything else about it, and that's fine. But there
19 might be a couple of them that you might want to
20 specifically address.

21 I think we're --

22 THE COURT: You mean the independent
23 evidence?

24 MR. SIMMONS: I tell you what, the way my

1 motion starts, it goes through your factual statement
2 and points out things that I think were either
3 misstated, or however you want to word it. You know,
4 part of it would be, for example, Doctor Bing's
5 (Phonetic) testimony. And what I tried to provide for
6 the Court, and I did a supplement to that motion, where
7 I went through the ASCLAD report that was done, and I
8 tried to show how the criticism that was in the ASCLAD
9 report were essentially the things that Doctor Bing was
10 talking about.

11 For whatever reason, the Moss case
12 was not included in the group of those initial inmates
13 when they had the special investigation. But what I
14 tried to do was to show specific criticisms that ASCLAD
15 made of the State lab, which ASCLAD concluded had a
16 direct impact on the validity of Zain's testimony, and
17 how those same criticisms were discussed by Doctor Bing
18 and applied here.

19 There's a line in your Order that I
20 think doesn't completely reflect what Doctor Bing
21 testified to, because in the overall gist of his
22 testimony, he was very critical, pretty much saying
23 that they had no protocol, and that all of these things
24 are very scientific. Zain did do the same exaggeration

1 of statistics that every expert found he did in the
2 Woodall case, for example, where you have -- you find
3 blood evidence at the scene, you're supposed to
4 eliminate the other possible donors, which would be the
5 Reggett family. And if, to the extent they are tied
6 to saying that the mother, who was murdered, Vanessa,
7 you're not supposed to include that when you give your
8 statistics because you don't know who contributed those
9 bloods, you don't know at what time.

10 I guess on the factual things, I
11 would just ask the Court to just review those again to
12 see if the Court feels obligated to readdress or make
13 clarifications of things that were in your Order. Some
14 of the things, Judge, and I realize that it may just be
15 me being kind of picky, and maybe because you didn't go
16 with the angle I was going on, but I thought some of
17 the things, particularly with Doctor Bing, I thought
18 weren't really correct, and didn't correctly pick up on
19 things that were being testified to, especially when
20 you tie it in with the ASCLAD report.

21 But actually, those are really the
22 main things that I think -- and once we've gotten that
23 type of Order addressing those things, I think it's in
24 a good position to take up, and that way the Supreme

1 Court will know what your ruling was and the basis for
2 it.

3 MR. BLEVINS: The Court is familiar with the
4 case, and the facts. We're satisfied with the Court
5 revisiting that issue. We have some differences with
6 Mr. Simmons in some of his interpretations, but on the
7 other hand, we're satisfied that the Court will reach
8 the right decision, and that's about all I need to say,
9 Judge.

10 THE COURT: I'm doing everything I can to
11 get every case I have pending done. And so I'll just
12 get to this very quickly.

13 MR. SIMMONS: Thank you, Judge.

14
15 WHEREUPON, the proceedings were concluded.
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1 STATE OF WEST VIRGINIA,
2 COUNTY OF KANAWHA, to-wit:
3

4 I, Connie L. Cooke, Official Reporter for the
5 Circuit Court of Kanawha County, do hereby certify that
6 the foregoing is a true and correct transcript of the
7 proceedings had and reported in the above captioned
8 matter and transcribed into the English language.

9 Given under my hand this 24th day of
10 August, 2001.
11
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13

14 Connie L. Cooke

15 Official Reporter
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